

**An Analysis of the Process of Ascertainment and Application
of Customary Law in the Formal Institutions of Adjudication:
Nigeria and South Africa**

By

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Rebecca Emiene Badejogbin

15th August, 2017

Date

DEDICATION

Mr Nicholas Ogwoja Omuh and Mrs Gimbiya Martha Omuh

Papa & Mama

You nurtured me towards this and I am grateful to God for
you.

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ABSTRACT OF THESIS

Judges of formal courts in Nigeria and South Africa do not easily have access to the contents of customary law they are required to apply in the course of adjudication and this has been a major challenge. This thesis examines the processes that courts adopt in the ascertainment and application of living customary law in Nigeria and South Africa in order to discover factors that influence the ascertainment and application of customary law. This research is qualitative in nature and utilises both doctrinal and empirical methods to make its findings. It examines the conceptualization of customary law in the context of the research against positivist and pluralist theories and analyses the doctrine of judicial discretion against relevant theories on how it impacts on the ascertainment and application process. The thesis also examines the current laws and procedures that regulate this exercise to discover how it contributes to what is ascertained by the court. For its primary sources, it utilised data obtained from the semi-structured interviews conducted, and, records of proceedings of cases on customary law heard by the formal courts in Nigeria and South Africa within a fifteen-year period. The secondary and tertiary sources utilised include text books, journal articles, official reports and publications, and other literature. It identifies factors within the purview of institutional, substantive, procedural, socio-economic and political factors, as well as other factors that influence how judges exercise discretion in the ascertainment and application of living customary law. The thesis states that these factors contribute in varying degrees, to enhance or impede the ascertainment and application of living customary law by these formal courts. It therefore proposes the consideration of these factors in the policies that seek to develop measures that would enhance the ascertainment and application of living customary law by the formal courts in Nigeria and South Africa.

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Abbreviations

AA American Anthropologist

AJ Acta Juridica

AJCL American Journal of Comparative Law

APLSP Archives for Philosophy of Law and Social Philosophy

ASCOPS African Studies Centre Occasional Papers Series

AUP African University Press

B&BM Bench & Bar of Minnesota

BHU Banaras Hindu University

BLJ Banaras Law Journal

BNR Botswana Notes and Records

BRA Biennial Review of Anthropology

BSOAS Bulletin School of Oriental & African Studies

BULR Boston University Law Review

CLFP Cornell Law Faculty Publication

CLJ Cambridge Law Journal

CLR California Law Review

CWRLR Case Western Reserve Law Review

DLJ Duke Law Journal

DLSR Duke Law Scholarship Repository

EIJSPLP Ethics An International Journal of Social, Political, and Legal Philosophy

EJCL Electronic Journal of Comparative Law

ESLJ European Scientific Law Journal

FCT Federal Capital Territory

FILJ Fordham International Law Journal

FSS Faculty Scholarship Series

GJF Global Jurist Frontiers

HRQ Human Rights Quarterly

IAS Institute of African Studies

IJARAFMS International Journal of Academic Research in Accounting, Finance and Management Sciences

IJGLS Indiana Journal of Global Legal Studies

IJNFPLThe International Journal of Not-for-Profit Law

ILJ International Law Journal

IPT Intellectual Property Theory

JAH Journal of African History

JAL Journal of African Law

JGH Journal of Global History

JHSN Journal of Historical Society of Nigeria

JICL Journal of International & Comparative Law.

JJS Journal for Juridical Science

JLH Journal of Legal History

JLP Journal of Legal Pluralism

JLPG Journal of Law, Policy and Globalization

JLPUL Journal of Legal Pluralism and Unofficial Law

JMAS Journal of Modern African Studies

JPES Journal of Politics, Economics and Society

JSAS Journal of Southern African Studies

JWAS Journal of West African Studies

KRL Kogi Reading in Law

L & P Law and Philosophy

LP Law & Philosophy

LR & DC Law Reform & Development Commission

LSR Law & Society Review

MCCLE Method & Culture of Comparative Law: Essays

MCLR Methodology of Comparative Legal Research

MJIL Melbourne Journal of International Law

MLR Modern Law Review

NIALS JLPP Nigerian Institute of Advance Legal Studies Journal of Law and Public Policy

NLJ Namibian Law Journal

NR Notes & Records

OC Occasional Paper

OHEPL Oxford Handbook of European Private Law

OISLS Oñati International Series in Law and Society

OJYRS Odù: Journal of Yoruba and Related Studies

OSLS Oñati Socio-legal Series

PEJ Potchefstroom Electronic Journal

RA Retch in Africa

RG Research Gate

SADC LJ South African Development Community Law Journal

SAJHR South African Journal of Human Rights

SALJ South African Law Journal

SAPL Southern African Public Law

SJLR St. John's Law Review

SOAS School of Oriental and African Studies

TICLQ The International and Comparative Law Quarterly

TIJNPL The International Journal of Not-for-Profit Law

TLR Texas Law Review

TNAF The Nigerian Academic Forum

UCLAII University of California Los Angeles International Institute

UILR University of Illinois Law Report

UILSRP University of Iowa Legal Studies Research Paper

WLR Wisconsin Law Review

WMLR William & Mary Law Review

WPSIDO Working Paper Series International Development Law Organization

YLJ Yale Law Journal

Part A
Concepts, context, methodology & theories

Chapter One

1 Background to the research

This thesis conducts doctrinal and empirical research in order to identify factors that influence the process of ascertainment of customary law adopted by formal courts in Nigeria and South Africa.

There is growing recognition of the need to affirm customary law in contemporary African societies, including Nigeria and South Africa.¹ Nigeria's and South Africa's experience with implementing customary law span their pre-colonial, colonial and post-colonial eras. During these periods, formal and informal institutions (with the exception of formal institutions for the pre-colonial era) played crucial roles in ascertaining, interpreting and enforcing customary law, and in its sustenance and jurisprudential development or under development. The reception of English Common Law and other forms of law in Nigeria and South Africa, atop pre-existing systems of customary law, including Roman-Dutch law in South Africa, gave birth to pluralistic legal systems.² The received systems co-existed with very diverse systems of customary law, with the former enjoying dominance.³ Customary law became subjected to limitations imposed by colonial laws, and subsequently by national constitutions, statutes and judicial pronouncements.

Some landmark decisions by the apex courts of both countries have received universal acclaim for their significant contributions to the development of customary law.⁴ However, concomitant with the acclaim are serious concerns that in a number of cases,

¹Ntlama N 'The application of section 8(3) of the Constitution in the development of customary law values in South Africa's new constitutional dispensation' (2012) 15 PER 29.

²Legal pluralism describes legal systems that encompass more than one legal tradition. In itself, pluralism describes a 'situation in which two or more legal systems coexist in the same social field' Merry S E 'Legal pluralism' (1988) 22 LSR 22 870. See also Allott A N 'International development of customary law: The restatement of African law project and thereafter' in Bennett T & Runger M (eds) *The ascertainment of customary law and the methodological aspects of research into customary law: proceedings of workshop* February/March 1995 LRDC Namibia, 31.

³Rautenbach C 'South African Common and customary law of intestate succession: a question of harmonisation, integration or abolition' (2008) 12 EJCL 2.

⁴For e.g. see Hinz M O 'Bhe v the Magistrate of Khayelitsha, or: African customary law before the Constitution' in Hinz M O & Helgard K Patemann (eds) *The shade of new leaves Governance in traditional authority: A Southern African perspective* (2006) 267; Mmusinyane B 'The role of traditional authorities in developing customary laws in accordance with the Constitution: *Shilubana and Others v Nwamitwa* (2009) 12.3 PER. See also *Mojekwu & Ors v*

the processes adopted by formal courts to ascertain customary law led them to apply versions of customary law that are different from those in usage by the particular communities.⁵ These concerns have long been acknowledged. In 1953, Allott used the phrase '*colossal pyramid[s] of error*' to describe customary law versions that are products of judicial decisions, but are markedly different from the actual practices of the people.⁶ Would the description fit recent judicial pronouncements on customary law? Concerns about such errors are not misplaced; judicial versions of customary law may offer great advancements in the jurisprudence of the law, without expressing or developing actual living customary law.⁷ Yet such judicial versions become binding (as part of state law albeit their limitations to be effective socially), even though they annul an important principle that gives customary law its essence. Ordinarily, customary law derives validity not from judicial authority, but from the people's acceptance to be bound by it.⁸ Ngcobo J. acknowledged this problem of distortion in *Bhe & Others v Khayelitsha & Others*:⁹

The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practiced in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these

Ejikeme & Ors (2000) 5 NWLR 40; *Mojekwu v Iwuchukwu* (2004) NWLR (Pt. 883) 196; and *Modjadji v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14 (30 May 2013). And also Onuoha R A 'Discriminatory property inheritance under customary law in Nigeria: NGOs to the rescue' (2008) 10 IJNFPL 2. See Centre for Reproductive Rights 'Legal Grounds: Reproductive and sexual rights in African commonwealth courts, Legal Grounds Volume II (2010) available at reproductiverights.org/sites/crr...net/.../pub_legalgrounds_vol2_2.10.pdf (accessed on 20/07/2013).

⁵ Woodman G R 'Some realism about customary law-the West African experience' (1969) WLR 128. See also *Motsoatsoa v Roro and Another* (2010) (46316/09) ZAGPJHC 122 para 14. See Bekker J & Van Der Merwe I 'Proof and ascertainment of the customary law (2011) 26 SAPL 124.

⁶ Allott A 'A note on the Ga law of succession' (1953) BSOAS 164 referred to in Woodman, *ibid* note 5 at 140. *Lewis v Bankole* (1908) 81 INLR 100. Here, a distinction was made between old customary law practices and current applicable customary law practices in a community.

⁷ This was reiterated by Dr Elena Moore and Kirsty Button in the presentations of their reports of empirical research at the Workshop on 'Families, Kin and State in South Africa' which held on 14 August, 2013 organised by the Centre for Social Science Research University of Cape Town. They asserted that lived realities differ from official positions in the community they researched. See Ndulo M 'Ascertainment of customary law: Problems and perspectives with special reference to Zambia' in Renteln A & Dundes a *Folk Law* (1994) 339. See also Himonga C & Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015).

⁸ Watson A 'An approach to customary law' (1984) 561 UILR 2-3.

⁹ [2004] ZACC 17 para 154.

abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.

There are other cases that raise concern on the ascertainment and application of living customary law.¹⁰ One identified reason for this concern is the process of ascertainment adopted by the court. In *Motsoatsoa v Roro and Another*¹¹ for instance, the court had to determine whether a valid customary marriage that complied with the Recognition of Customary Marriages Act¹² was concluded between the applicant and the late son of the first two respondents. The requirements prescribed by the Act are that both parties must have attained the age of 18, and consented to the marriage; and that 'the marriage must' [have been] 'negotiated and entered into or celebrated in accordance with customary law'.¹³ To determine whether the third condition was satisfied, it was necessary for the court to ascertain the procedural requirements for concluding a valid customary marriage, as stipulated by the customary law to which both parties were subject. The court accepted the respondents' position that there was no valid customary law marriage because the applicant was never handed over to the deceased's family. Whether the court's choice of customary law represented the living customary law that applied to the parties is a subject of interest and it was a decision that was subject to the judge's exercise of discretion. The judge's exercise of discretion may have been influenced by factors which may have enhanced or impeded the ascertainment of the relevant living customary law since a number of considerations play out in the exercise of discretion. This research identifies factors that affect the process of ascertaining customary law by courts. The research will present ideas and options for a more effective process.

How judges approach the ascertainment of customary law, or why their approach often results in what is called 'colossal pyramid of errors', may be explained through the

¹⁰ *Titi Gladys Mahala v Nolili Nkombombini & Anor* (2005) ECJ NO: 026/2006; *Motsoatsoa v Roro and Anor* Supra footnote 3; *Mojekwu v Iwuchukwu* supra note 4; *Mojekwu & Others v Ejikeme & Ors* supra note 5; *Uwaifo v Uwaifo*, (2013) LPELR-20389(SC); *Ojiogu v Ojiogu* (2010) suit no. SC 235/2004 delivered on 5th March, 2010; *Mayelane v Ngwenyama and Another* supra note 4. *Shilubana and Ors v Nwamitwa* supra note 4.

¹¹ (46316/09) [2010] ZAGPJHC 122.

¹² 120 of 1998.

¹³ Ibid Section 1.

considerations they make in exercising judicial discretion in the ascertainment and application of customary law. The research therefore carries out a conceptual analysis of judicial discretion, a concept of the theory of positivism juxtaposed with legal formalism and realism against the background of legal pluralism. This thesis states that the exercise of judiciary discretion under positivism juxtaposed with realism and formalism fail to provide justification for judicial ascertainment of customary law which results in the application of distortions of living customary law.¹⁴

In the process of ascertaining customary law, the court adopts two ways or approaches, namely by judicial notice and by leading evidence to establish customary law as fact.¹⁵ It is important to distinguish between these processes, approaches and methods of ascertainment for the purpose of clarity in this thesis. The process of ascertaining and applying customary law is part of the broader court process of adjudication. While the ways/approaches are utilised in the process of ascertainment (or establishment of customary law) by the court, in adopting either of the approaches, the court utilises the methods as aids.

In this thesis, 'methods' refer to the various means in which customary law is ascertained within and outside the court. They include declarations by local authorities of the contents of customary law (which may be given the force of law as secondary legislation), judicial precedents,¹⁶ codification,¹⁷ restatement,¹⁸ opinion of experts regarding particular customary laws,¹⁹ texts,²⁰ manuals,²¹ customary courts case book analysis,²² the use of

¹⁴ See Himonga 'The living customary law in African legal system' in Fenrich, Galizzi & Higgins (eds) *The Future of African Customary Law* (2011) 54 where the author mentioned that the consideration for legal certainty must be balanced against other factors. See also *Shilubana v Nwamitwa supra* note 4 para 47.

¹⁵ See ss 16 – 19, 68-70, & 73 of the Evidence Act, 2011 (Nigeria); See s 1 Law of Evidence Amendment Act 45 of 1988.

¹⁶ Allott op cit note 2 at 32.

¹⁷ Princloo M 'Selected Projects of the codification and restatement of customary law' in Bennett & Runger M (eds) op cit note 2 at 36.

¹⁸ Allott op cit note 2 at 32.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Allott 'The judicial ascertainment of customary law in British Africa' (1957) 20 MLR 257.

²² Hinz M O 'The ascertainment of customary law: what is ascertainment of customary law and what is it for? The experience of the customary law ascertainment project in Namibia.' (2012) 2 (7) OSLS 85-105 available at <http://ssrn.com/abstract=2100337> (accessed on 11/04/2013).

assessors,²³ the opinion of native chiefs, academic records obtained through questionnaires,²⁴ and self-statement.²⁵ These methods aid the ascertainment process adopted by the court.

The broader process of ascertainment refers to the proof, that is ways in which customary law is ascertained or established in court and the course adopted by the judge to filter the evidence advanced, which usually includes the methods, to prove the applicable living customary law. It also includes evidential procedure under the law of evidence, and other (extraneous) factors that influence the judge's choice of the applicable customary law whether directly or indirectly.

In South Africa, '[a]ny court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty.'²⁶ The provision presupposes to some degree that the version of customary law of which the court takes judicial notice is the correct statement of the living customary law. This may indeed be so, if the procedure adopted in ascertaining that version of customary law really did lead to a statement of the actual living customary law, or where the lived version has not moved away from the judicial version of which judicial notice is being taken. The critical question then is how would a court determine with certainty that the version of which it takes judicial notice, is the applicable living customary law? What factors influence the court in ascertaining living customary law?

Again, if the judge chooses to require proof of customary law as fact, what process does s/he adopt to ascertain the applicable living customary law? How does the judge sift through the evidence placed before him/her, to arrive at the appropriate living customary law? According to Woodman, the process of proof is uncertain and is 'a large area for intriguing research into the sources of judges' opinion on these frequently uncertain matters in different jurisdictions.'²⁷ It is important that the process adopted by the court ascertains the living

²³Ubink J 'The quest for customary law in African state court' in Fenrich J, Galizzi P & Higgins T (eds) note 14 at 93.

²⁴Hinz op cit note 22.

²⁵Ibid.

²⁶Section 1 (1) Law of Evidence Amendment Act *ibid*.

²⁷Woodman G 'Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria' in Allott A & Woodman G (eds) *People's Law and State Law: the Bellagio Papers* (1985) 149.

customary law in order to achieve justice and not trample on the people's notions and anticipations of justice.²⁸

The process is also crucial to the need to preserve customary law as 'an original source of law' that is at par with other sources of law, and which, like the common law, can be developed as the need arises.²⁹ According to Ngcobo, J. in *Bhe v Khayelitsha*, customary law 'must be considered on its own terms and "not through the prism of common law."³⁰ Like all laws, indigenous law in South Africa now derives its force from the Constitution'.³¹ Pertinently, '[i]ts validity must now be determined by reference not to common law but to the Constitution.'³² This thesis investigates the process adopted by formal courts for ascertaining customary law in Nigeria and South Africa with a view to determining the adequacy of these processes to secure the application and development of living customary law.

Academics (including anthropologists) and even judges agree on the need to discover a well-defined process for formal courts to ascertain customary law.³³ However, the factors that affect ascertainment must first be identified through a review of the current processes of ascertainment utilised by judges.³⁴ Typically, judges apply the principles of evidence and courts' rules of procedure, but other factors apparently affect their analyses. These could include the court's desire for constitutional compliance, the science of judging, and such other factors that will be explored in the course of the study. This is buttressed by Woodman's assertion that formal courts are incapable of ascertaining living customary law and that once traditional courts become formal courts, they too cease to apply living customary law.³⁵ This is because the norms become institutionalized and assume a different form to fit into the formal courts based on 'distortions as a result of misunderstanding and of the perceived need to make the

²⁸Ibid.

²⁹Contrary to what had been the practice for decades where 'common law methods and ideas have often been used in the courts' development of customary law' Ibid at 145.

³⁰*Bhe* supra note 9.

³¹*Alexkor Ltd and Anor v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18 para 51.

³²Ibid.

³³Himonga C & Bosch C 'Application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) SALJ 326 & 336.

³⁴Himonga C 'The living customary law in African legal system' in Fenrich, Galizzi & Higgins (eds) op cit note 14 at 57. See also the majority decision and the dissenting judgment of *Bhe* supra note 9. See Ubink op cit note 23.

³⁵Woodman op cit note 27 at 153-157.

customary law applicable to state institutions’; Himonga has argued that other factors, such as the structure of the courts and their closeness to the people whose customary law is under consideration, may be relevant.³⁶ This debate raises much broader questions beyond the process of ascertainment and application of customary law which is the focus of this thesis. The analysis in this thesis is limited to its focus.

This thesis is based on the hypothesis that where formal courts fail or succeed in applying living customary law, it is due to a combination of factors - some of which may be intrinsic and some extraneous to the court institution, rules and procedures - that impede or enhance their ability to properly ascertain customary law. The study seeks to determine what these factors are and how they affect the discretion of the judge in the ascertainment process. Therefore this research was conducted against the background of how the doctrine of discretion plays out in the ascertainment and application of customary law.

2 Research objective

The research pursues two primary aims:

1. Theoretical aims:
 - (a) Analyse the contextual application of the doctrine of judicial discretion under the theory of positivism against legal formalism and realism in ascertaining and applying living customary law under legal pluralism.
2. Practical aims:
 - (a) Examine the processes and challenges of ascertaining customary law by formal courts in Nigeria and South Africa;
 - (b) Identify the factors that influence the process utilised by formal courts to ascertain living customary law in cases.

³⁶Ibid. See also Woodman G ‘Customary land laws within legal pluralism over the generations’ (2014/2015) 4 SADCLJ 199-200. This was also part of the criticisms of the Traditional Court Bill. See Legal Brief ‘Critics slam Traditional Courts Bill despite changes’ available at file:///C:/Users/USER/Downloads/file.pdf (accessed on 29/05/2017) para 4. See Himonga C *Family and Succession Laws in Zambia* (1995) 31-33.

3 Research question

To achieve the above objectives, the thesis will seek answers to this overarching question: What factors inform the judge's determination and application of living customary law? In addressing this question, the thesis will also examine the following:

1. Whether judicial versions of customary law are justified by the concept of judicial discretion under the theories of legal positivism, formalism and realism against the backdrop of legal pluralism;
2. The processes formal courts adopt to ascertain and apply customary law and how these enable the ascertainment of living customary law.

4 Categorisation of customary law

The local law applicable to indigenous peoples in Africa is the focus of this research and has been referred to by different terms such as 'indigenous law', 'native law', 'native law and custom', 'native customary law', 'African law' and sometimes simply 'customary law'.³⁷

'Customary law' will be the term used in this thesis because it is commonly used to refer to this law and it is the term used in the Constitutions and some of the legislations discussed in this thesis.

Generally, '[c]ustomary law derives from social practices that the community concerned accepts as obligatory'.³⁸ Woodman however cautions that choosing the definition of customary law that is most suitable to a particular task is more important than making a universally acceptable definition.³⁹ He also cautions that in seeking to define customary law, the judicial version of customary law should not be ignored.⁴⁰ This is because this version compels enforceability over other versions. Woodman's caution provides the reason for this research. Where the courts fail to ascertain the living version, the 'judicial version', which may be a distortion, becomes binding and enforceable in state institutions over the version practiced by

³⁷African Conference on Local Courts and Customary Law which held in Dar es Salaam, Tanganyika 8th – 18th September, 1963. Record of Proceedings of the Conference 20. It was also explained here that 'African Law' refers to all laws applicable in Africa which includes and is not restricted to customary law.

³⁸Bennett T W *Customary Law in South Africa* (2004) 1.

³⁹Woodman op cit note 5 at 143.

⁴⁰Ibid at 145.

the people, although in practice the living customary law continues to be practiced and enforced within the communities.

Customary law is generally categorised into two versions. The first, the official version, is produced through the participation of the state,⁴¹ and reduced into writing by codification, restatement, and precedent (which may include academic writings that have been affirmed in court judgements). Stewart describes it as 'the captured and formalised version that are recorded in the law reports, built upon and interpreted through an Anglo-Saxon Roman-Dutch law procedural and substantive law filter'.⁴² Woodman brands the official version as the 'lawyer's version', a mix of different sources that includes the adulterated version of the traditional chiefs, rules processed and developed in colonial courts and decisions that are products of such developments.⁴³ This is what was handed over to 'post independent Africa' as the official customary law.⁴⁴ It ceases to retain the attributes of customary law, and can be different from the actual living customary law.⁴⁵ By nature, customary law evolves to incorporate changing norms in the society. Courts that focus attention on the official version fail to properly ascertain the current version of customary law. They may however do so if they are conscious of the current social realities.

The second version is called the 'living version' and it describes the current normative practice that is accepted by the generality of the community as binding.⁴⁶ It has been referred to as 'sociologists' customary law',⁴⁷ 'folk law',⁴⁸ and 'unofficial law'.⁴⁹ Given the right circumstances, it may be captured as official customary law but it will be subject to the

⁴¹Himonga op cit note 36 at 15. A third version has also been identified, called the 'Traditionalist' or 'idealist' version. It is the rules of customary law in its pure form, unmodified by social change and development. This idealist version is generally devoid of special considerations made in particular circumstances and as a result, may be different from the living customary law which the courts ought to apply. Ibid.

⁴²Stewart J 'Why I cannot teach customary law' Zimbabwe LR 18-28 referred to in Himonga C & Manjoo R 'What's in a name? The identity and reform of customary law in South Africa's constitutional dispensation' in Hinz O & Patemann H (eds) op cit note 4 at 330.

⁴³Woodman op cit note 5 at 130.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶Woodman in Allott & Woodman (eds) op cit note 27 at 152. Molokomme A 'Legislating in matters of customary law: issues of theory and method' in Bennett & Runger (eds) op cit note 2 at 56.

⁴⁷Woodman ibid at 153.

⁴⁸Ibid, 143.

⁴⁹Himonga op cit note 36 at 15

criticisms discussed in chapter four. This is the version that presents the challenge of ascertainment to the courts.⁵⁰

5. The problem with ascertaining customary law in formal courts in Nigeria and South Africa.

Customary law requires ascertainment for purposes of adjudication and development in the formal courts. Since it is impracticable for the judge to embark on empirical research to ascertain customary law, it is expedient for the judge to have aids.

The factors that affect the ascertainment of customary law are not peculiar to courts of general jurisdiction. Different factors may affect courts that are within the formal court structure differently. There are customary courts in the formal court structure presided over by qualified legal practitioners, while the others are led by lay judges who are presumed to be conversant with the actual customary practices of the people within their jurisdiction. However, the adoption of these courts as part of the formal court structure has created challenges on the knowledge of the applicable customary law. Additionally, in certain circumstances, lay judges still require the proof of some customary laws because the heterogeneous nature of communities made up of people with diverse cultures and customary laws necessitates this.⁵¹ An example is the difficulty of resolving disputes between persons who, while belonging to the same community, are subject to different systems of customary law because they belong to different 'villages, clans, lineages or households' within that community.⁵²

6 Research justification

Customary law still regulates the lives of an overwhelming majority of the populations of Nigeria and South Africa, in ways that affirm their distinct cultural worldviews and traditions.⁵³

⁵⁰*Bhe* supra note 9 para 154.

⁵¹*Ibid.*

⁵²Woodman 'A survey of customary laws in Africa in search of lessons for the future' in Fenrich, Galizzi & Higgins (eds) op cit note 14 at 17.

⁵³Ndulo M 'African Customary Law, Customs, and Women's Rights.' 18 (2011) 18 ILGLS 87-120. Okany *The Role of Customary Courts in Nigeria* (1984).

Nigeria's estimated population of over 180 million people⁵⁴ consists of more than 500 languages⁵⁵ and about 350 ethnic groups.⁵⁶ Each ethnic group has its own distinct customary law systems which are also distinguished along lines of community, clan, and even family. The diversity of customary law systems in South Africa is not much different. The country has a population of over 50 million⁵⁷ people, distributed across 11 official languages and several ethnic groups that have distinctive customary law systems also along lines of community, clan, and even family.⁵⁸ The diversity of these ethnic systems is a reality that cannot be ignored from a legal or anthropological point of view.⁵⁹

Constitutions, national legislation, and various international and regional instruments attest to the vital place of customary law in African societies.⁶⁰ In South Africa, the Constitution provides for the recognition of the people's right to practice their culture. It also provides for the development and application of customary law on an equal pedestal with other sources of law,⁶¹ as an 'original source of law' in its own right.⁶² The Nigerian Constitution creates customary courts and acknowledges that these and other courts of general jurisdiction may apply customary law.⁶³ Integrating customary law into mainstream law in Nigeria and South Africa has entailed integrating customary courts into mainstream systems. However, the affirmation of customary law as an original source of law would entail much more than a

⁵⁴ This is the population statistic according to World Bank country data on Nigeria. See <http://www.worldometers.info/world-population/nigeria-population/> (accessed on 06/02/2017).

⁵⁵ Nigerian languages are listed according to the states in which they occur on the following website: <http://www.uiowa.edu/intlinet/unijos/nigonnet/nlp/regions.htm> accessed on (22/03/2017)

⁵⁶ Ototie O 'Nigeria's identifiable ethnic groups', available at <http://www.onlinenigeria.com/tribes/tribes.asp>

⁵⁷ As at July, 2012 South Africa Demographics Profile

2013. http://www.indexmundi.com/south_africa/demographics_profile.html accessed on 25/11/2012 See also 'Census 2011 Census in brief Statistics South Africa' which placed the population at 51, 770,

⁵⁸ http://www.statssa.gov.za/Census2011/Products/Census_2011_Census_in_brief.pdf (accessed on 11/12/2013).

⁵⁹ Use of Official Languages Act, 2012 GG 35742 of 2 October 2012 Act No. 12 of 2012.

⁶⁰ Commission on Legal Pluralism (CLP), 'South Africa Conference 2011 – a brief report by Professor Hanri Mostert', September 8 - 10 2011, Cape Town.

⁶¹ Art 17 (2) & (3) African Charter on Human and Peoples Rights Adopted in June, 1981. Art 1 International Covenant on Civil and Political Rights 1966. There are also national legislations that provide for regulations of specific rights under customary law discussed in this thesis.

⁶² See ss15, 30, 31, 37 and 211(3) 1996 Constitution of South Africa. See *Shilubana* supra note 2 para 54.

⁶³ Himonga op cit note 33 at 52 & 53.

⁶⁴ See ss 6, 237, 265-269, and 280-284 1999 Constitution of Nigeria.

fixation on integrating court structures. It should also entail, as a desirable and necessary object, the integration of customary law jurisprudence into mainstream jurisprudence.

For the purpose of this research, the formal institutions of adjudication in Nigeria and South Africa are courts established by the constitutions and statutes of both countries as forming their court structures with jurisdiction over customary law disputes. In South Africa, they are the Constitutional Court, the Supreme Court of Appeal, the high courts, magistrate courts and the courts of chiefs and headsmen.⁶⁴ In Nigeria, they are the Supreme Court, the Court of Appeal, the high court, magistrate courts and customary courts (known by different designations). They are successors to the former native courts that operated prior to and during colonial rule.⁶⁵ Nigeria operates a specialised customary court of appeal, which is at par with the high court. The court hears appeals on customary law disputes from customary courts and is constituted by both legal practitioners and non-legal practitioners who are versed in customary law and who preside together over disputes.

These courts in both countries have constitutional responsibility to subject customary law to constitutional standards, the bill of rights, and other statutes.⁶⁶ They are therefore in a position to contribute to the development of customary law, that is, if they can successfully wade through the challenges of ascertaining what the laws are.

Himonga asserts that ascertainment of customary law by courts is ‘an acknowledged problem’ and Hinz describes the methods of ascertainment applicable in the process of ascertainment as problematic.⁶⁷ For instance, a witness’ testimony of a customary practice may be tainted by ‘ignorance, bias or corruption’.⁶⁸ Also problematic is determining where it is

⁶⁴Section 166 of the 1996 South African Constitution.

⁶⁵ African Conference on Local Courts note 37 at 11.

⁶⁶They are also subject to international and regional human rights standards as rectified by their respective governments.

⁶⁷Himonga C ‘African customary law in South Africa – The many faces of Bhe v Magistrate Khayelitsha’ (2005) RA 177. See also Hinz op cit note 21. According to Nico Horn in his review of *Customary Law Ascertained Volume 1. The Customary Law of the Owambo, Kavango And Caprivi Communities of Namibia*; Hinz M O (Ed.), assisted by Ndatelela E Namwoonde, Windhoek, Namibia Scientific Society in association with the Human Rights and Documentation Centre, Faculty of Law, University of Namibia, 2010. C Himonga op cit note 21 at 54.

⁶⁸ A N Allott (ed) *The future of law in Africa* Record of Proceedings of the London Conference which held on 28 December 1959-8th January, (1960) 15.

appropriate to utilise judicial notice,⁶⁹ to use assessors, referees and referrals.⁷⁰ Another dilemma arises when it is reduced into writing.⁷¹ Unlike common law, the doctrines of equity and codified law, customary law consists of oral traditions that are impressed upon the hearts of those who know them,⁷² and are evolving⁷³ and flexible⁷⁴ and it therefore loses its essential qualities of flexibility and adaptability when reduced into writing. It becomes fixed and ceases to be a true reflection of the evolving practices of the people.⁷⁵ There is also the risk that it was not accurately captured in writing. Therefore writing or codifying customary law stultifies its development in these respects. Hinz explained that codification will deprive customary law of

Its openness to accommodate reconciliatory solutions to problems, instead of allowing the law to win over the parties. Customary law is particularly open to negotiations: not only those required to achieve solutions acceptable to all the parties to a case, but also those that navigate between the application of different laws.⁷⁶

Some of these methods of ascertainment may present factors that obscure the discovery of living customary law.

South Africa is chosen as a case study because ascertainment of customary law as in any African country has been problematic. Added to this is the important position customary law now occupies and the potential for development it is open to.⁷⁷ Nigeria is used as a case study also because ascertainment of customary law had been problematic and, for its distinctive customary court system from which additional factors may be identified.

⁶⁹Ibid.

⁷⁰Allott op cit note 21 250-51.

⁷¹Bennett & Runger (eds) op cit note 2 at 32

⁷²Hinz op cit note 22.

⁷³Woodman op cit note 5 at 15.

⁷⁴Bennett & Runger (eds) op cit note 2 at 1. See also Hinz op cit note 22.

⁷⁵Chanock M *The Making of the South African Legal Culture 1902-1936* (2001) 243-272. For instance the Natal Code of Zulu Law and Kwa Zulu Act covering the Code on Zulu Law are not regarded as true expressions of the customary laws of the people. See Prinsloo op cit note 16 at 36.

⁷⁶Hinz op cit note 22.

⁷⁷Contrary to what had been the practice for decades where 'common law methods and ideas have often been used in the courts' development of customary law'. Ibid 145.

The rationale for this thesis is hinged on the fact that customary law is not easily ascertained,⁷⁸ and that flawed ascertainment processes conduce to flawed impositions that are anything but customary law, but are nevertheless passed off as such, to be observed as every judicial decision should be. These problems call for a resolution of the process of ascertaining customary law. This thesis proceeds on the premise that identifying the factors that stand in the way of effective ascertainment will greatly enhance the development of living customary law.

7 Literature review

This literature review is to simply highlight the works that influenced this study especially in identifying gaps that make this research necessary. It is nonetheless vital to state here that literature review undertaken in this study permeates the entire thesis.

Attention was given to the need to ascertain customary law at the conference on 'The Future of Law in Africa' which was held in London in 1959/60.⁷⁹ Since then, the need for customary law to achieve easier ascertainability and certainty has remained a concern. In his analysis of the subject at the conference, Allott concluded that the different 'machineries' utilised by courts to prove customary law were not fool proof. That is, they do not adequately aid the court in ascertaining the living customary law.⁸⁰ However, his work was generic in reference to Africa and not specifically, as in this case, to Nigeria and South Africa. Besides, the structure of the courts, as well as the socio-economic and political changes in both countries which give rise to new factors are expressed differently. While it discussed some of the methods of ascertaining customary law in court which supports the background of this research, his work was limited to mere examining (without investigating) how it works in practice and in particular, in customary courts.⁸¹ At any rate, he pointed out that how process of ascertainment works in practice continues to require research and is crucial to its development and effective application by judges.

⁷⁸Bennett op cit note 2 at 51. T O Elias *The Nature of African Customary Law* (1956) 2. Ijeoma N A 'The repugnancy doctrine and customary law in Nigeria-A proposal for restatement and codification' (2003) 5 NAF 61-68 available at <http://www.uniben.edu/abstracts/repugnancy-doctrine-and-customary-law-nigeria-proposal-restatement-and-codification>, (accessed on 14/03/2012).

⁷⁹ It was a subject for discussion at the conference on 'The Future of Law in Africa' note 68.

⁸⁰Allott op cit note 21 at 244-63.

⁸¹Ibid.

At a 1963 'African Conference on Local Courts and Customary Law', the subject was again raised.⁸² Discussions explored the possibility of improving the measure of certainty in the methods of recording customary laws. The ascertainment of customary law was also acknowledged as a predicament that must be addressed. Although the conference faulted the use of written records of customary law as aids for ascertaining customary law,⁸³ it did not address the focus of this research.

Most of the papers that have been written in this field focus on improving the methods of ascertainment of customary law, rather than on the process adopted by the courts. Chanock,⁸⁴ Ubink,⁸⁵ Hinz⁸⁶ and Kwena⁸⁷ in their respective writings assert the defects in the various methods of ascertaining customary law and tried to find solutions in one method or the other⁸⁸ but hardly address factors that would aid the process of judicial ascertainment of customary law.

Bekker and Van der Merwe⁸⁹ argue that despite the constitution's elevation of the status of customary law, its evolving nature makes it necessary that it be ascertained through evidence led before the court and not only through judicial notice as is the case with Common law. In analysing the proof of customary law in court, with reference to particular cases, the authors acknowledged irregularities that called for further scrutiny of the approach to prove customary law in courts.⁹⁰ They also acknowledged that the provision of the Law of Evidence Amendment Act did bestow discretion on the judges in the application of judicial notice.⁹¹

While ensuring compliance with constitutional principles when interpreting or ascertaining customary law may indeed be beneficial, it is also capable of unwanted consequences. Himonga and Manjoo⁹² have argued that subjecting customary law to

⁸² African Conference on Local Courts op cit note 37 at 21.

⁸³ Ibid, 35.

⁸⁴ Chanock op cit note 76.

⁸⁵ Ubink op cit note 23.

⁸⁶ Hinz, M.O. '*Bhe v the Magistrate of Khayelitsha*, or: African customary law before the Constitution' (2006).

⁸⁷ Hinz & Kwena 'The ascertainment of customary law' in Hinz & Patemann H K (eds) op cit note 4 at 203-14.

⁸⁸ Ibid.

⁸⁹ Bekker op cit note 5.

⁹⁰ Ibid 119, 120 & 127.

⁹¹ Ibid 116-117.

⁹² Himonga & Manjoo op cit note 41.

constitutional reform threatens its demise. They find evidence of this in pieces of legislation and pronouncements of the Constitutional Court that have replaced customary law with the principles of Roman-Dutch law and common law in the areas of succession and marriage,⁹³ and point out that this will lead to the ossification of the customary law. To prevent ossification, the authors recommend limitations on legislative interventions, and reiterate the need for a more authentic process of ascertaining customary law on a case-by-case basis. They have also suggested the inclusion of customary law in the training curriculum of judges.⁹⁴ However, they did not address the focus of this thesis. In a separate paper, Himonga called for ways to strengthen the techniques currently used to ascertain living customary law.⁹⁵ Strengthening these techniques requires a critical look at the factors that influence the court's choice of customary law in cases before it so as to identify the weaknesses and strengths of the techniques currently utilised.

Tonwe and Edu⁹⁶ have discussed the process of proving customary law through judicial notice and evidence. Eri,⁹⁷ and Keay and Richardson⁹⁸ also discussed the need to engage assessors to enhance the ascertainment of customary law by the court. They however did not discuss the factors that influence judges in the formal court structures for effective ascertainment of the living customary law. These oversights are significant. According to Wieland Lehnert,⁹⁹ lack of understanding of the nature of customary law and the drive for constitutional compliance are the reasons for the failure to ascertain the living customary law in some South African cases. Lehnert's focus was however on the harmonization of 'customary law with human rights'. It did not analyse cases with a view to discover the range of factors that affect ascertainment.

⁹³ They cite as examples the *Bhe cases*, the Interstate Succession Act, Succession Bill of 1998, and the Recognition of Customary Marriages Act.

⁹⁴ It is also the researcher's opinion that the content of the training received by judges who adjudicate on customary law matters is a factor that will aid the ascertainment of customary law in formal courts.

⁹⁵ Himonga op cit note 34 at 57.

⁹⁶ Tonwe S & Edu O *Customary Law in Nigeria* (2007) p 13-24.

⁹⁷ Eri U E *Law and Procedure in the Area Court* 2nd ed (2004).

⁹⁸ Keay E & Richardson S *The Native and Customary Courts of Nigeria* (1966) 208-210.

⁹⁹ Lehnert W 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 SAJHR 241.

Elias has written extensively on the concept and nature of customary law which provides a good base for this research with respect to the nature and concept of customary law and an understanding of these is crucial for research of this nature.¹⁰⁰ The same applies to the works of Allot,¹⁰¹ Woodman,¹⁰² Kerr,¹⁰³ Chanock,¹⁰⁴ Seymour,¹⁰⁵ Bennett,¹⁰⁶ Dlamini,¹⁰⁷ Okany,¹⁰⁸ Ndulo, Koyana, Himonga, Rautenbach,¹⁰⁹ and, more recently, Mnisi-Weeks,¹¹⁰ Mwalimu,¹¹¹ Tobin,¹¹² and by the Nigerian Institute of Advanced Legal Studies¹¹³ which have contributed to giving this research a firm base. Bennett's paper on 'Re-Introducing African Customary Law to the South African Legal System'¹¹⁴ was insightful on the courts' path in ascertaining customary law in South Africa.

Woodman and Himonga¹¹⁵ agree on some factors that affect the judge's ability to correctly ascertain the applicable living customary law. These include insecurity, convenience, personal experience and others. These present a good basis for this research even though they did not engage the depth of research undertaken for this thesis. Other relevant texts and writings are mentioned across the chapters and worthy of mention are the texts and papers on the relevant theories and doctrines discussed in chapter two. This research seeks to determine

¹⁰⁰ E.g. Elias T O *The Nature of African Customary Law* (1956); Elias T O *The Impact of English Law on Nigerian Customary law* (1958); Elias T O *Nigerian Land Law and Custom* (1951).

¹⁰¹ Utilised across this thesis

¹⁰² Also utilised across this thesis.

¹⁰³ Kerr A *The Customary Law of Immovable Property and of Succession* 3rd ed (1990)

¹⁰⁴ Chanock M *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* by Martin Chanock (1985).

¹⁰⁵ Bekker J C *Seymour's Customary Law in Southern Africa* (1989).

¹⁰⁶ Bennett T W *Customary Law in South Africa* (2004).

¹⁰⁷ .Dlamini CRB 'The Role Of Chiefs In The Administration of Justice In Kwazulu' A thesis fulfillment the degree Faculty of Pretoria 1988 available at <http://uzspace.uzulu.ac.za/bitstream/handle/10530/270/The+role+of+chiefs+in+administration.+C.+Robinson+and+M.+Dlamini.pdf?sequence=1> (accessed on 30/12/2016)

¹⁰⁸ Okany op cit note 53.

¹⁰⁹ The various works of these authors are referred to in the chapters of this thesis.

¹¹⁰ Mnisi S *Interface Between Living Customary Law(s) of Succession and South African State Law* being a thesis submitted for the award of the degree DPhil at New College Oxford 2009.

¹¹¹ Mwalimu C *Nigerian Legal System* (2007) 128.

¹¹² Tobin, B *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters* (2014).

¹¹³ Nigerian Institute of Advanced Legal Studies (ed) *Restatement of Customary Law of Nigeria* (2013).

¹¹⁴ Bennett T W 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 AJCL.

¹¹⁵ Himonga op cit note 36 at 13-33.

the factors by examining the process leading to the court's decision through case analysis, interviews and the relevant laws.

8 Scope and limitations of the research

The focus of this research is not to ascertain customary law, but to analyse the process of ascertaining and applying customary law for the purpose of identification of factors that influence how the judges arrive at what is ascertained.¹¹⁶ The study does not seek to indicate the proportionality of the factors but merely seeks to identify the factors that determine the ascertainment and application of customary law in both countries.

The research commenced with a contextual analysis of customary law which permeates the chapters with respect to its ascertainment and application. It also carried out an analysis of the concept of judicial discretion under different theories as it relates to the ascertainment and application of living customary law. Apart from the brief history of the process of ascertainment by courts in Nigeria and South Africa, the discussion of each method of ascertainment in chapter four includes historical accounts of their utilisation.

The doctrinal aspect of the research is restricted to the doctrinal sources listed under the methodology. While the materials utilised are majorly for Nigeria and South Africa, other materials on other countries in Africa and beyond are utilised for a broader analysis and appreciation of certain practices and other issues pertaining to the research subject.

For the empirical aspect of the research, interviews were conducted with judges including chiefs and headmen, court registrars and clerks. The research is restricted to concluded cases alone. This is because the research analyses records of proceedings which includes judgements to identify factors in the context of the research. The thesis however does not claim to identify all factors intrinsic and extrinsic to the courts' rules, procedures and evidential principles but those that appear glaring to the researcher.

The adjudicatory institutions that form the object of this research are restricted to the formal courts. The research analyses civil cases in customary law because the private lives of

¹¹⁶ A true ascertainment of the living customary law must engage sociological and legal investigations, but that is not what this research seeks to achieve. See Woodman *op cit* note 5 at 1.

the indigenous people are mainly regulated by customary law. The research also did not restrict the civil cases used to a particular subject because there are not too many cases that are available for analysis and the same process of ascertainment and application of customary law apply to all categories of civil cases. For South Africa, decided cases from the superior courts of record, namely the Constitutional Court, the Supreme Court of Appeal and the High Court, were analysed. The Constitutional Court is considered because it is the final arbiter with respect to matters of customary law related to constitutional provisions and the application of the Bill of Rights. The same applies to the Supreme Court of Appeal for non-constitutional matters. The High Court is considered for two reasons; first, cases that fit into the nature of analysis proposed in this study are few in the Constitutional Court and the Supreme Court of Appeal. Secondly, the process of ascertainment is usually more thoroughly carried out at the High Court, being the original trial court amongst courts of superior jurisdiction. For the lower courts, decisions by the magistrate court and the court of chiefs or headsman were analysed. Appeals from decisions of the court of chiefs and headsmen go to the magistrate court, where the process of ascertainment usually commences because the court of chiefs and headmen should be versed on the applicable customary law.

For Nigeria, the similar reasons offered above apply with respect to the courts except that the Supreme Court is the final arbiter in all matters including constitutional matters. Decided cases from the Supreme Court, the Court of Appeal, the High Court and the Customary Court of Appeal in Nigeria were analysed. The Customary Court of Appeal provides a unique perspective. For the lower courts, cases decided in customary courts are analysed. Since decisions of customary courts are usually not appealable to magistrate courts in Nigeria, magistrate courts are excluded from this research. The research also excluded sharia courts. Although Islamic law is regarded as customary law in Nigeria,¹¹⁷ it is a distinct legal system, with a different nature from customary law, primarily sourced from the Quran and *hadith* and not

¹¹⁷Cap 42, Laws of Northern Nigeria, 1963.

indigenous to the people.¹¹⁸ In addition, the fact that it is recorded also gives it a nature that is quite different from customary law.¹¹⁹

Finally, the scope of this research excludes the determination of practical norms.¹²⁰ It acknowledges the limitations of the challenge faced by courts in determining the point at which a particular customary practice can be said to have generated into a binding norm that requires the force of law for enforcement.¹²¹ In such instances, what may be presented to the court may best be described as practical norms but this is not considered in this thesis. Rather the research is limited to what will direct the judge towards ascertaining living customary law.

The 2011 Court of Appeal Rules in Nigeria which were analysed in this research were repealed and replaced by the Court of Appeal Rules No. 17 2016 which came into effect on the 6th of December, 2016 after the analysis of the data. It is important to note that this new law does not affect the substance of this research since the substance of the rules as it affects the court's role in the ascertainment and application of customary law in the Court of Appeal remain the same.

9 Research methodology

It is important to commence by stating that while the main points of my methodology are stated here, other details with direct reference to the chapters will be related at the respective chapters for clarity.

The methodology combines doctrinal and empirical research. The thesis analysed sources such as constitutions, legislation and decided cases with specific cases analysed using the records of proceedings obtained from the courts.¹²² Analysis was also carried out on

¹¹⁸Oba A 'Islamic law as customary law: The changing perspective in Nigeria' (2002) 51 ICLQ 819.

¹¹⁹Islamic law is given the status of customary law in Nigeria because it replaces the customary laws of the people who have adopted it and it regulates their personal relations. It is however different in that its basic elements are static and do not evolve and it is not formed by the community, See Oba ibid 817-850. See also Salman R 'Codification and restatement of customary law in Africa: The journey so far' in Borokini A (ed) (2006) 3.

¹²⁰'Practical norms may be defined as the various informal, de facto, tacit or latent norms that underlie the practices of actors which diverge from the official norms'. See Olivier de Sardan J 'Practical norms: informal regulations within public bureaucracies (in Africa and beyond)' (2015) RG available at file:///C:/Users/USER/Downloads/02%20practical%20norms.pdf (accessed on 21/03/2017) p8.

¹²¹Ubink J 'The quest for customary law in African state court' in Fenrich J, Galizzi P & Higgins T (eds) note 14 at 85.

¹²²Hoecke M V 'Methodology of comparative legal research' (2015) 1.

secondary and tertiary sources such as text books, journal articles, official reports and publications and other literature. The research is qualitative in nature and customary law civil cases at the various courts decided within the last fifteen years counting from 2015 were utilised as primary data and analysed for its findings.¹²³ Consequently, the South African cases analyzed are those cases settled under the current Constitution. During this time, judges became responsible for ensuring the continued existence of customary law as a distinct source of law at par with the Common law and the Roman-Dutch law. The Nigerian cases analyzed are also those cases decided during the pendency of the current Constitution which subjects every source of law to the fundamental rights contained in the Constitution. Of necessity, records of proceedings of cases that went on appeal and the judgment of the final appellate court was given within the 15 year range were also utilised even if the judgments of the preceding courts were given earlier than the fifteen year range.

The empirical aspect of the research involved interviews with judges and registrars of formal courts as a 'primary method of field research'¹²⁴ and the data were used as primary sources. For both countries, there were instances where sitting judges could not be accessed despite repeated efforts. So both sitting and retired judges who were presiding over or had presided over courts with jurisdiction to hear matters with customary law were interviewed.

The first phase of my empirical research involved identifying and obtaining relevant cases to be used for case analysis. The second phase involved interviews. Records of proceedings were obtained for all court types within my scope. At the lower courts in North West Province, South Africa, some of the records obtained were written in vernacular and were translated by an experienced translator.

The interviews conducted were no identifiers and were semi-structured. Open ended questions were utilised and many times further questions were asked for clarification. The

¹²³ Other cases decided earlier were also utilised only for purpose of further analysis across the chapters. It should be noted that the years in the case numbers are the years the matters were filed in court and cases in Nigeria generally take a number of years to be heard and judgement given.

¹²⁴ Prinsloo op cit note 17 at 42.

qualitative research method of conversational personal interview was used.¹²⁵ Triangulation of methods was employed in analysing the data.¹²⁶

The findings are primarily based on data garnered from interviews conducted with judges and traditional leaders (where applicable) and triangulated with the records of proceedings of cases decided by the courts and analysed for the purpose of this thesis. Data were also garnered from court registrars, and these as well as the relevant laws were also utilised where necessary. The judges were interviewed to gain insights into how they exercise discretion as they ascertain and apply customary law to cases before them and what factors can influence this process. Chief registrars and other court registrars/clerks were interviewed to obtain information on how the administrative running of the courts can affect this process and what range of factors may emanate from them. The records of proceedings were utilised to scrutinize how the courts have so far, ascertained and applied customary law and, to identify what factors have featured in impacting this process. The relevant laws were analysed to determine the legal framework of this process, and identify the loopholes and strengths that impact on this process. All these specifically respond to the research question.

In South Africa all the registrars interviewed besides one are qualified lawyers. In Nigeria, all the chief and deputy chief registrars interviewed are qualified legal practitioners with several years of experience in practice or at the lower bench before their appointment. Other court and general registrars interviewed comprise of both lawyers and non-lawyers.

The research analysis utilised is both descriptive and explanatory. ‘Explanatory’ answers the ‘why’ questions while ‘descriptive’ answers the ‘what’ questions. The thesis utilises a contributory explanatory approach.¹²⁷ That is, some of the factors identified will be correlated and may jointly contribute to the outcome of the version of the customary law ascertained.¹²⁸ For instance, a judge’s training and orientation may both contribute to the ascertainment of a particular version of customary law. The contributory approach simply means that the factors

¹²⁵ PPA 696 research methods data collection strategies II: Qualitative research available at <http://www.csulb.edu/~msaintg/ppa696/696quali.htm> accessed on 1st July, 2013.

¹²⁶ Princlloo op cit note 17 at 124.

¹²⁷ Part 1 ‘What is Research Design? Context of Research Design’ available at <http://www.nyu.edu/classes/bkg/methods/005847ch1.pdf> ibid. (Accessed on 8/07/2013) 1.

¹²⁸ Ibid, 3 & 4.

identified could produce the consequence of ascertainment of a distorted or appropriate version. This approach may be 'probabilistic' or deterministic.¹²⁹ It is 'probabilistic' where, for instance, despite the factors identified, it may not necessarily lead to the ascertainment of a distorted version of customary law. It is 'deterministic' where the factors identified invariably lead to the ascertainment of a distorted version by the courts. The doctrine of judicial discretion is also utilised in the descriptive and explanatory research analysis.¹³⁰ It is vital to state that the study does not seek to indicate the proportionality of the factors but merely seeks to identify the factors that determine the ascertainment and application of customary law.

The method of sampling adopted is stratified and purposive and also based on availability. The subjects and participants were selected to represent the categories of courts in Nigeria and South Africa with jurisdiction to hear customary law matters. Their selection was also due to their relevance to the object of the research and the research question.¹³¹ The courts each have defined jurisdictions in the strata of the hierarchies of the court systems. The records of proceedings utilised were obtained from these courts and the judges interviewed were either serving in these courts or had served in them and had heard cases in which customary law was applied, some of which are analysed in this thesis. Sometimes the snow-balling approach was utilised in the selection of the particular court and judge interviewed based on the recommendations of contacts.

The locations¹³² for the field work are where the formal courts are located. For Nigeria, research was carried out in the Federal Capital Territory (FCT), Abuja for the simple reason that it has within its geographical borders the Supreme Court and all the court types that constitute the subject of this research which are the Court of Appeal, high court, customary court of appeal, and the customary courts. Research was conducted in four customary courts located in

¹²⁹Ibid, 5.

¹³⁰Ibid, 5, 6, 7 & 8.

¹³¹Mack N, Woodsong C, Macqueen K M & Namey G Gt E 'Qualitative research methods: A data collector's field guide' FHI funded by USAID 2005 North Carolina p.5 available at <http://www.fhi360.org/sites/default/files/media/documents/Qualitative%20Research%20Methods%20-%20A%20Data%20Collector's%20Field%20Guide.pdf> (accessed on 08/06/2016).

¹³²See Appendix A for diagrams of the locations.

three out of the six Area Councils within the FCT. Research was conducted in the customary courts in Garki (Abuja Municipal Area Council), Gwagwalada, Dutse (Bwari Area Council), and in Kubwa (Bwari Area Council) respectively located in urban (Garki) and semi-urban (Dutse, Kubwa and Gwagwalada) areas with Gwagwalada having a large population of its indigenous communities. Three judges sit in each of these courts and I interviewed only one judge from each of the courts.

For South Africa, the research was carried out at the Constitutional Court in Gauteng Province and, Bloemfontein where the Supreme Court of Appeal is located. For the high court, magistrate court and courts of chiefs and headsmen, the research was carried out in the North West Province. This is for the sole reason that it was the only place I could locate courts of chiefs and headmen that keep records of proceedings and this was after months of making enquiries via email, phone calls, contacts and even travelling to meet contacts. The choice of the magistrate courts and high court in the same province was because appeals from the chiefs' courts go the magistrate courts and thereafter to the high court.

I was referred to the magistrate court in Mahikeng by a judge at the high court in Mafikeng on the understanding that I would find relevant information there. I was equally referred to the magistrate court at Lehurutshe by a magistrate and a contact who had previously done some academic research there for the same reason.¹³³ The choice of this court was also for the additional reason of its location (not too far from the chief's courts) and the fact that it heard appeals on cases from the chiefs' courts I researched. The choice of the chief magistrate court and regional magistrate court in Mafikeng, the capital of North West, is for the additional reason that it is an urban area which hints of cosmopolitanism and gives an insight into how the judges ascertain and apply customary law in heterogeneous settings with respect to customary laws foreign to them. I was referred to the chief's court in Gopane by an academic researcher because it kept records of its proceedings. I was also referred to the chiefs' courts in Dinokana and Witklegat Moshana by the officer in charge of the Tribal Authority Office in Lehurutshe because they form part of the Bahurutshe Clan which is

¹³³For his honours and master's degrees in sociology from the University of Witwatersrand.

comprised of seven chiefs made up of Gopane, Moshana Bagalencoe Witklegat, Dinokana, Suting, Tshiete and Motswedi in no particular order in the North West Province.

I conducted a pilot study at the Cape Town Regional Magistrate Courts at Cape Town City and Wynberg as well as at the Chief magistrate's court also in the city of Cape Town. Through the pilot study, I noticed gaps in the information I obtained in relation to my research question. I framed further interview questions which I utilised in my field work.

Prior to my field research, I had obtained 'ethics clearance for research involving human participants' from the Faculty's Ethics Committee. Several communications via emails and several phone calls were made with the registrars of the courts where I obtained records of proceedings and conducted interviews in South Africa, and with my contact in Nigeria months before the proposed date of the interviews. I obtained letters of introduction from the university and permission to carry out research from heads of the courts where the research were carried out. Regardless of these, I still encountered a number of challenges. The letters were delayed due to the post office strikes that lasted for months, inadvertence of the administrative staff who forgot to convey these communications to the head of court in South Africa, the busy schedules of the judges and reluctance to grant interviews on the part of a high number of the judges and a few registrars.

After the approval of my ethics application, I made a total of five trips to the various locations of my research to enable me obtain court records of proceedings on the cases selected for my research and to conduct interviews. I conducted a total of 50 interviews comprising of 21 in South Africa and 29 in Nigeria. Thirty-one judicial officers¹³⁴ were interviewed which include traditional chiefs, a chief's deputy, and a senior councilor who is the chief's uncle and his 'right hand man'.¹³⁵ Sixteen were interviewed for South Africa and fifteen for Nigeria.

The total number of records of proceedings utilised for this research covered 98 cases with 55 from South African courts and 43 from Nigeria. Records of proceedings were more easily accessible in South Africa.

¹³⁴Persons who sit as judges in the formal courts including the chiefs and headmen.

¹³⁵A person who sits with the chief over disputes, advises him and must be with the chief where ever he goes.

Country						Total
	Supreme Court	Court of Appeal	High Court	Customary Court of Appeal	Customary Courts	
Nigeria	9	9	8	7	10	43
	Constitutional Court	Supreme Court of Appeal	High Court	Magistrate Court	Courts of Chiefs & Headmen	
South Africa	7	8	14	11	15	55
					Grand Total	98

Table depicting the number of records of proceedings analysed per court in both countries.

The records of proceedings utilised in this research were obtained from the respective courts in person. With respect to the Constitutional Court, Supreme Court of Appeal and the North West High Court, in South Africa, the cases were sighted online on the Safflii website using the search engine to locate all cases that had customary law content by searching with the word 'custom'. A further scrutiny was made to determine whether and to what extent the cases related to the subject of this research. It is necessary to state that at these courts, a request was made for the latest judgments at the time of the research to confirm that no relevant case was left out and this was determined. At the magistrate courts, the records of proceedings of cases in which judgment was given within the 15 year range for the research were produced and were perused and those relevant to this research were selected. Most of the records of proceedings utilised for the chief's courts were obtained from the records submitted to the chief magistrate courts Mafikeng and at Lehurutshe on appeals.

The process of selecting cases was more stringent for Nigeria. There were very few judgments posted on line and where there were, they were not in a manner such as that done by the Southern African Legal Information Institute (Saflii) for South Africa from which a search engine could assist in locating those with customary law issues. Some Supreme Court cases were identified on line and the judgments had to be read to determine whether or not they would cover areas relevant to the research. For the Court of Appeal, customary court of appeal and customary courts, however, a request was made for all the judgements of the courts' division within the period of this research which were made available to the researcher. The judgements were perused to determine which ones were relevant to the subject of the thesis but some of the records could not be found despite several efforts to locate them.

Records of proceedings of cases on appeal to the Supreme Court decided by other divisions of the Court of Appeal were utilised. There is only one Court of Appeal for the entire Country with several divisions including the Abuja division and the judges are regularly circulated within short durations around the divisions. Therefore any of the judges could sit over such matters depending on what divisions they are at, at the particular point in time. Analyzing cases decided in other divisions (appealed to the Supreme Court) would generally represent the position in the Court of Appeal. After all the Abuja division was selected for this research solely because of its geographical proximity to the Supreme Court and other courts researched and not because of any peculiarity it possesses.

The jurisdiction of the high court to hear chieftaincy matters was transferred to the Customary Court of Appeal so I could not identify any matter with customary law question decided in the high court in Abuja. There are however some narrow instances where the high court could hear matters with customary law questions. However, despite seething efforts, of speaking to the chief registrar, various registrars, heads of departments such as the probate department, and various legal officers¹³⁶ to the various judges, and going through several judgements, and at an old archive,¹³⁷ no relevant customary law case could be located.

¹³⁶ Legal officers are research assistants to the judges of the high court. Each judge has a legal assistant assigned to him/her.

¹³⁷ Located at Life Camp, Abuja where the records of the FCT high court cases were kept.

Extensive time was spent at the Judicial Research Centre¹³⁸ located within the premises of the high court which has a database of the courts' decisions from 2010 in soft copies.

I did however obtain records of proceedings of cases decided by the high court of other states including those bordering Abuja that share similar jurisdiction with the high court in Abuja and appeals from their decisions go to the Court of Appeal and the Supreme Court. These records were obtained from the records of proceedings at the Court of Appeal and the Supreme Court from the cases analysed. These high courts utilise similar civil procedure rules to that operative in Abuja, and their procedures are regulated by common federal legislations such as the Evidence Act. Their judges are also similarly qualified and trained under a uniform curriculum, and are similarly promoted to the Court of Appeal (which serves the entire Country) under the same criteria. The judges are all regulated by the same code of conduct and assessed by the Nigerian Judicial Council and all attend courses at the Nigerian Judicial Institute.

The criterion utilised in selecting the cases in all courts is their relevance to the research i.e. within the subject of the research and the year bracket. Because there were not that many cases available, almost all cases that were found were selected.

It is important to state here that this thesis is not explicitly comparative in essence, since its primary aim is to identify factors that influence how judicial discretion is utilised in the process of ascertaining and applying customary law by courts. Of necessity, comparison is used as a tool because the thesis engages case studies in two jurisdictions.¹³⁹ However, it is simply employed here as merely a method of enquiry¹⁴⁰ in the context of this thesis.¹⁴¹ After all, one of the types of studies described as falling under comparative law, according to Peter De Cruz, is one that 'analyse[s] objectively and systematically solutions which various systems offer for a given legal problem'.¹⁴² Comparison will be used as a tool in analysing the distinctive peculiarities that feature in the factors identified in the case studies of Nigeria and South Africa.

¹³⁸ A non-governmental organisation funded by the European Union to strengthen judicial integrity and the capacity of Nigeria's federal courts. Part of their duties is to keep records of judgements of the court.

¹³⁹ Reitz J C 'How to do comparative law' (1998) 46 AJCL 624.

¹⁴⁰ Reimann M 'The progress and failure of comparative law in the second half of the twentieth century' (2002) 50 AJCL 684.

¹⁴¹ Reitz J C op cit note 139 at 684.

¹⁴² De Cruz P *Comparative Law in a Changing World* 3rd ed (2007) 7.

This is in line with Konrad Zweigert and Hein Kotz who define comparative law as ‘an intellectual activity with law as its object and comparison as its process’.

The form of comparison utilised here is beyond the analysis of just the ‘black letter rules’ but includes how they address the process of ascertainment and application of customary law in a practical functional way within the context of the ‘procedural and institutional frameworks’ of both jurisdictions.¹⁴³ This form also includes the social context surrounding the legal rules bearing in mind that it is done within a lawyer’s ‘context’ and would not include the epistemological engagements of an anthropologist to the extent of ‘epistemological scepticism of the postmodernists.’¹⁴⁴

Though comparative law has acquired various techniques and methods¹⁴⁵ this thesis adopts a technique relevant to its legal and operational context¹⁴⁶ which is mainly the functional approach but could include elements from any of the methods since the methods are interrelated and are known to include similar elements.¹⁴⁷ Besides, scholars in comparative

¹⁴³Reimann M op cit note 140 at 679. This study unlike the emphasis on comparative research is restricted to rules as practiced in the nineteenth century and compared rules, judicial decisions and other social factors that contribute to the exercise of discretion in ascertaining and applying customary law by courts. Current trends in comparative law adopt this style. See also Hoecke op cit note 122 at v.

¹⁴⁴Palmer V V ‘From Leretholi to Lando: Some examples of comparative law methodology’ (2004) 4 GJF 4.

“‘Postmodern critique’ ‘dominates scholarship in the fields of philosophy, anthropology, and law and society. This critique has now become fairly influential within comparative law as well. It essentially contends that each legal culture is a unique, culturally contingent product which is incommensurable and untranslatable except through a deep understanding of the surrounding social context.’

¹⁴⁵ Though categorized by Palmer as the following - ‘historical comparisons, functional comparisons, evolutionary comparisons, structural comparisons, thematic comparisons, empirical and statistical comparisons’. Ibid at 2. And by Hoecke as ‘the functional method, the structural method, the analytical method, the law-in-context method, the historical method and the common-core method’. See also Hoecke op cit note 122. Ralf insists that ‘beyond mere doctrinal comparison’, there are basically two i.e. the functional and cultural legal approaches. See Ralf M ‘Comparative Law’ (2011) DLSR forthcoming in, Oxford Handbook of European Private Law available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty_scholarship (accessed on 02/01/2017) 2. Comparative law in Africa also engages these methodologies while calling attention to specific features that distinguishes the African context such as its indigenous laws, hybrids and its development trajectories. See Okeke C N ‘Methodological approaches to comparative legal studies in Africa’ in Mancuso S & Fombad C M (ed) *Comparative Law in Africa Methodologies & Concepts* (2015) 43-49. Odor A ‘Applying the tool of comparative law to the study of Africa’s multiple development pathways’ in Mancuso S & Fombad C M 75-84. Twoney M ‘Legal salmon: Comparative law and its role in Africa’ in Mancuso S & Fombad C M 85-106.

¹⁴⁶Glendon M A Osakwe M W & Osakwe C (ed) *Comparative Legal Traditions: Text, Materials and cases* (1985) 11.

¹⁴⁷ Ralf M op cit note 145 at 1-2.

law, including Konrad Zweigert and Hein Kotz, acknowledge that there is no agreement on the methodologies to be followed.¹⁴⁸

Esin Orucu asserts that there is no standard methodology for comparative law and that comparison is only possible where data is available and obtainable.¹⁴⁹ He also states that comparatists choose a variety of methods depending on the context.¹⁵⁰ In essence, the thesis in its expositions and analysis reveals similarities and differences between the two jurisdictions studied within the scope of the subject of this research and the research question.¹⁵¹ This is done in an attempt to enhance the process of ascertainment and application of customary law in the formal courts which is its primary focus.

This thesis not only studies the applicable laws and rules, but includes how they function through their judicial institutions and actors – judges – within the two jurisdictions facing similar challenges with the ascertainment and application of customary law. This is to discover the factors that influence the judge's discretion in this situation¹⁵² in order to enhance the 'development of the domestic legal system[s]'.¹⁵³ It is vital to state here that the primary objective of this thesis is not to proffer solutions to the challenge of ascertainment and application of customary law but to discover factors that influence the judges' role in this regard which should indicate how the solutions could be proffered.

Of essence, customary norms are very central to the engagement with comparative law in Africa because it is one of its main sources of law.¹⁵⁴ The thesis also utilises the technique of micro-comparison by focusing on just an aspect of the legal systems of both countries, i.e. the comparison is focused on the legal rules and practice that pertain to the focus of this research and not necessarily based on the legal systems.¹⁵⁵

¹⁴⁸Zweigert K and Kotz H *An Introduction to Comparative Law* (1977) 24.

¹⁴⁹Orucu E 'Developing comparative law' in Orucu E & Nelken D (ed) *Comparative law: A handbook* (2007) 48-49.

See also See Zweigert *ibid*.

¹⁵⁰Orucu *ibid* at 52-53.

¹⁵¹ Reitz *op cit* note 139 at 620.

¹⁵²Okeke C N 'Methodological approaches' note 145 at 44 & 45.

¹⁵³Okeke C N *African Law in Comparative Law: Does Comparativism have Worth?* (2009) available at http://works.bepress.com/christian_okeke/1 (accessed on 14/12/2013) 6 & 7.

¹⁵⁴*Ibid* 46. Odor *op cit* note 146 at 77.

¹⁵⁵ De Cruz *op cit* note 141 at 136. Hoecke *op cit* note 123 at 115.

African legal systems have been excluded in major text on comparative law.¹⁵⁶ Also noteworthy is that most of the texts and materials on comparative law and judicial discretion are with reference to western and positivist law and not on African customary law. Some of these writings are however applicable here because an essential part of the work is regulated by positivist and Eurocentric law except for the customary courts in Nigeria and courts of chiefs and headmen in South Africa where it is partly regulated by the applicable customary law. An attempt was also made to pitch customary law into these theories merely for the aspects that apply to it.

It is vital to state that the presentation of the findings are my perceptions of the issues involved after careful consideration and that this thesis does not claim to have identified all factors present but merely identified factors that appear glaring to me. It is also important to state that since the interviews conducted are no identifiers, my presentation is done in a way that conceals the identity of the interviewees.¹⁵⁷

10 Outline of the thesis

The thesis is divided into four parts. The first – Part A – which comprises chapters 1 and 2, is focused on the concepts, contexts, methodology and theories. The second – Part B – comprising chapters 3 and 4 is focused on the process adopted by formal courts in Nigeria and South Africa in the ascertainment and application of customary law. The third – Part C – which comprises of chapters 5, 6 and 7, is focused on the factors that influence the ascertainment and application of customary law in formal courts of both countries. The fourth – Part D – is the conclusion which draws on the themes covered in the preceding chapters is composed of chapter 8.

Chapter one focuses on the background of the research which explains the concept and general applicability of customary law in Nigeria and South Africa. It states the research

¹⁵⁶Fombad C M 'Africanisation of legal education programmes: The need for comparative legal studies' in Mancuso & Fombad op cit note 145 at 5.

¹⁵⁷See Appendix A for the maps of Nigeria and South Africa Showing the FCT Abuja and the Provinces in South Africa where the research was carried out. Appendix B contains maps that show broadly the geographical locations of the customary courts and, the chiefs and headmen courts researched. Appendix C contains the interview questions for judges while Appendix D contains the questions for court registrars and other similar designates.

question, its aim and justification, and has a brief literature review of scholarships on customary law in Nigeria and South Africa. It also articulates the problem statement which is the challenge in the process of the ascertainment and application of customary law. It explains the limitations of the research and the extent of its scope as well as the methodology adopted.

Chapter two commences by examining the concept of customary law in the context of this research, including its statutory and judicial definitions. It engages relevant theories of pluralism and positivism, the doctrine of judicial discretion and briefly the theories of formalism and realism in relation to customary law and the exercise of judicial discretion in its ascertainment and application. It also engages problems associated with this concept in the formal courts in Nigeria and South Africa. The chapter tries to position the ascertainment and application of customary law in debates on how judicial discretion should be exercised to find its own notch.

Chapter three examines the process of ascertaining customary law in both countries and analyses one of the ways through which customary law is ascertained and applied which is judicial notice. It explains the problems of ascertainment of customary law during colonial times, states the current court structures with jurisdiction to hear customary law matters, analyses how customary law is ascertained through judicial notice and discusses the challenges with this form of ascertainment in both countries.

Chapter four focuses on the second way customary law is ascertained and applied in the formal courts of both countries which is through proof as facts by evidence. It distinguishes how this is done in courts of general jurisdiction and courts specifically set up to hear customary law cases. This chapter discusses the various methods utilised under this approach and brings out the criticisms for each of the methods as a basis for the assertion that they do not adequately aid the ascertainment and application of customary law in the courts and specifically in the courts of Nigeria and South Africa.

Chapter five is a thematic presentation of the institutional and substantial factors identified from the empirical data and records of proceedings from courts of superior jurisdiction in both countries. This presentation pertains to how the factors concerned influence the ascertainment and application of customary law with respect to the discretion exercised by

judges in this context. It explains how these factors enhance or mar the ascertainment of living customary law.

Chapter six is a thematic presentation of the procedural and socio-economic and political factors also identified from the empirical data and records of proceedings from courts of superior jurisdiction in both countries. These factors influence the ascertainment and application of customary law specifically, with respect to the discretion exercised by judges in this context. Again, it also explains how these factors enhance or mar the ascertainment of living customary law.

Chapter seven is also a thematic presentation of the factors identified from the empirical data and records of proceedings but from courts of lower jurisdiction in both countries that influence the ascertainment and application of customary law. This presentation is also with respect to the discretion exercised by judges and chiefs in this context. It explains how these factors enhance or mar the ascertainment of living customary law.

Part D is comprised of chapter eight which is the conclusion. It summarises the main points of the chapters and broadly analyses the effect of the factors identified. It states that judges do indeed exercise discretion in the ascertainment and application of customary law and several factors do influence how this discretion is exercised. Some of these factors are directly derived from and are associated with the court institution, rules and procedures, and others are extrinsic to it. Sometimes the discretion exercised by judges is mild and sometimes wide and well outside the rules of court and the principles of law of evidence. The conclusion proposes a model process and states that the factors identified provide a platform upon which a process that enhances the ascertainment and application of living customary law can be nurtured.

Chapter Two

The Conceptual Nature of Customary Law, Theories and Doctrines

2.1 Introduction

For many decades in legal scholarship, African customary law was evaluated through the lenses of western legal concepts.¹ This approach to studying African customary law ignored or diminished the value of indigenous African law. Fortunately however, the approach began to yield steadily to a new wave of scholarship that promotes and seeks to understand indigenous African law as a distinctive value system in its own right.² The shift is indeed apposite, and has been motivated by the fact that how law is conceptualized has moved away from being fixated with state made and state enforced rules to include the participation of other institutions in the broader context of social relations³ that create legal obligations. However, the shift has had its challenges especially with regard to ascertaining customary law. The introduction of English legal principles, the conceptualisation of legal education in Africa according to western legal thought or theories has been a major setback in the manner that indigenous African law has been conceptualised in legal scholarship. This set back has also affected how customary law is interpreted and applied frequently by western-style courts. As a result, different views about African customary law have been developed by individuals, scholars and courts that have had dealings with it.

The divergence in perceptions about customary law makes it imperative to explain the context in which customary law is used in this thesis and to state the basis for analysing its ascertainment and application by formal courts. It should be pointed out however, that it is inevitable that this analysis must be worked out in a pluralistic context. Societies in which a customary law system exists are typically pluralistic; customary law is made to co-exist with

¹Elias T O *The Nature of African Customary Law* (1956) 5.

² Works of anthropologists such as Malinowski who influenced anthropology through personal field research and personally studied the traditional groups in Papua New Guinea underpin this. See http://classes.yale.edu/03-04/anth500b/projects/project_sites/01_Whitney/annotated.htm (accessed on 23/04/2015). See also Moore S F *Law as Process an Anthropological Approach* (1978) 218.

³Griffiths J 'What is legal pluralism?' (1986) 24 JLP 38-9.

other systems of law, and its relevance is asserted within that pluralistic context. Although Nigeria and South Africa operate within the precepts of state centralism, they are nonetheless pluralistic legal systems.

Centralism describes legal systems that recognize only laws that are made by the state which are 'uniform', 'exclusive' and administered by only state institutions.⁴ Such a statist approach denies the existence of other systems of law such as customary law, except to the extent that they have been enacted into law. The recognition of living customary law not enacted into law in South Africa adheres to centralist precepts because this recognition is made by constitutional provisions that were interpreted by the Constitutional Court.⁵ However, the existence of customary law as well as other state and non-state legal systems in both countries is evidence of the operation of a pluralist system and this thesis therefore adopts Griffith's position that legal centralism is a myth.⁶ The existence of customary and other systems of law make the legal systems of both countries pluralist.

In a pluralistic state, whether weak or strong, customary law as a normative system exists as law.⁷ In South Africa, which falls under both categories, customary law is regarded as state law at par with other sources of law but subject to the Constitution and other legislation. In Nigeria, which also falls under both categories, the recognition accorded to customary law by the Constitution is tacit. The Constitution does not expressly affirm customary law as a system of law, though it provides for a system of customary law adjudication, and subjugates it to the Constitution, English law and statutory law.

⁴Ibid at 3.

⁵Sections 39(3) & 211 1996 South African Constitution. See also *Mabena v Letsoalo* (1998) (2) SA 1068 (T).

⁶Griffiths note 3 at 4.

⁷Weak legal pluralism is a situation where different legal norms operative within a state are recognized and regulated by state institutions while strong legal pluralism is explained as a situation where both state and non-state legal norms co-exist within the boundaries of the state and are respectively regulated by both state and non-state institutions. South African state law recognises customary law as well as Common law and the Roman-Dutch law while it does not acknowledge religious norms. Nigeria recognises customary law as well as Common law and Islamic norms in certain parts, but fails to recognise other religious norms. See Sezgin Y 'Theorizing formal pluralism: quantification of legal pluralism for spatio – temporal analysis' (2004) 36 (50) JLPUL 102. See also Rautenbach C 'Deep legal pluralism in South Africa: judicial accommodation of non-state law' 60 JLP (2010) 145-146.

The regulatory framework that underpins the recognition, ascertainment and application of customary law tends to support and foster official versions of customary law rather than living customary law which describes the people's daily practices or lived realities.

The challenges of ascertaining the relevant living customary law make the use of judicial discretion inevitable in customary law disputes. The laws of evidence and procedure in Nigeria and South Africa allow significant latitude for the exercise of judicial discretion when applying customary law. The latitude may lead to the failure to apply living customary law even for the sake of achieving legal certainty.⁸

This thesis argues that the exercise of judicial discretion cannot justify the failure to ascertain and apply living customary law by the courts. This study is partly undertaken on the basis that judicial discretion is a field that is yet to be adequately explored with respect to the application of customary law by courts in a pluralistic legal system. This chapter examines the conceptual nature of customary law and the concept of living law, the implications of its statutory definition and its sources in both countries. The chapter also offers an analysis of judicial discretion, using relevant legal doctrines that help to explain the application of judicial discretion in the ascertainment and application of customary law by formal courts.

2.2 The conceptualization of customary law

This section broadly looks at the conceptualization of customary law as a basis for how it should be ascertained and applied by the courts. Hence it is used as the premise upon which the statutory definitions of customary law in both countries are considered in order to determine whether they point to what should be ascertained and applied in court. The section also discusses living customary law and explains relevant terms that feature in the thesis.

The legal systems of Nigeria and South Africa operate along the line of positivism and illustrations of their underlying positivist leaning can be found in the jurisdiction of state courts to apply state laws. The analysis of the process of the ascertainment and application of customary law is conducted on state institutions established and validated along positivist

⁸Referring to its judgement in *Bhe & Ors v Khayelitsha & Others* [2004] ZACC 17, the Constitutional Court explained in the case of *Shilubana and Ors v Nwamitwa* (CCT 03/07/2008) ZACC para 84 that 'certainty was a vital consideration.

practice. Thus, while in its essential nature, living customary law may not be regarded as state law or positivist law, its formal recognition by state courts and other state institutions creates official versions that may be regarded as part of state-made (positivist) law.⁹ Customary law is state law only when it is formally acknowledged as such. In the real sense however, it is not positivist law but encompasses social realities and practices that form the basis of its existence as norms operative in communities which are referred to as living customary law. Yet, by its very nature and operation, customary law cannot be described as positivist, or contained within the structures of positivist law.

This thesis aligns its view in part with Van Nieberk's that living customary law in the absence of state acknowledgement is law in its own right; but also agrees with Himonga et al that it is state law and may also be termed as positivist law due to its formal acknowledgement by the State.¹⁰

Moore's description of customary law supports this position. Using the analogy of the 'semi-autonomous social field', she wrote that a number of legal systems exist simultaneously and are interdependent of each other in every society, and described such legal systems as social fields that have 'rule-making capacities, and the means to induce or coerce compliance'.¹¹ In her view, no society can exist without law. Pertinently, a society's social institutions – inclusive of indigenous institutions – have legal features.¹² To understand the entire legal system of a society therefore, it becomes necessary to understand the entirety of its people, institutions and operations.¹³ This makes customary law a necessary part of understanding a society's legal culture.

The imperative of such an approach cannot be overemphasized where the society has elements of legal pluralism.¹⁴ Therefore, customary law cannot be excluded from the status of law because it is not officially recognized by the state. This approach is in tune with the concept

⁹ According to Bennett, official versions suffer the problem of presuming the contents of customary law. See Bennett T A *Sourcebook of African Customary Law for Southern Africa* (1991) 2.

¹⁰ Himonga C, Thandabantu N, Maithufi I P, Mnisi-Weeks S, et al *African Customary Law in South Africa Post-Apartheid and Living Perspectives* (2014) 46.

¹¹ Moore note 2 at 56.

¹² Griffiths note 3.

¹³ Ibid.

¹⁴ Griffiths op cit note 3 at 5.

of legal pluralism which states that more than one legal system exists in a state and are separately administered by state and non-state institutions.¹⁵ This also agrees with the conceptualization that law does exist outside state structures as expounded by Malinowski,¹⁶ Schapera¹⁷ and Bohannan.¹⁸ Whether law is seen as mere 'mutual obligations' between individuals with 'sanctions and incentives residing in ordinary social relations' as promoted by Malinowski or as legal rules capable of being enforced by institutions such as the courts as espoused by Schapera, Pound, Hoebel and others,¹⁹ Moore argued that the conception of law has strayed from that promoted by Malinowski to include the participation of institutions and organisations in the 'context of legal obligations'.²⁰

This thesis therefore attempts a convergence of the conceptualization of customary law on a social premise from a sociological and anthropological point of view with the judicial process in a positivist' legal system as operates in Nigeria and South Africa. Commenting on Moore's notion of interdependence existing among semi-autonomous societies, Himonga and Bosch state that this suggests that state courts may sometimes 'apply norms of living customary law'²¹ and it is that law that ought to be ascertained and applied by formal courts endowed with jurisdiction to do so. According to Himonga and Bosch, the South African constitutional provision on the right to culture is an indication of weak positivism which 'implies the recognition of theoretical frameworks of law that lie outside the legal positivist approach to law', in this case, legal pluralism.²²

The legal systems of Nigeria and South Africa may be rightly described as positivist. Regardless of the wide disparities in their views, positivists generally have the same underlying

¹⁵ Ibid.

¹⁶ Malinowski B 'Crime and custom in savage society' (1926) available at <https://archive.org/details/crimecustominsav00mali> (accessed on 15/02/2017).

¹⁷ Moore, S F 'Law and anthropology' (1969) 6 BRA 259.

¹⁸ Ibid. see also Bohannan P 'The differing realms of the law' (2009) 67 AA 34 & 35.

¹⁹ With variations restricted to that which operate as rules in social institutions but become law only when 'enforced by legal institutions' as espoused by Bohannan, or enforced by 'controlling authority' as espoused by Pospisil. See Moore note 2 at 220-222.

²⁰ Ibid.

²¹ Himonga C & Bosch C 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?' (2000) 117 SALJ 322.

²² Ibid at 327.

philosophy. Legal positivism highlights the 'conventional' character of law:²³ law is a social conception that is founded on norms that have been put forward in court decisions, legislation and even through practice.²⁴ According to positivists, the legitimacy or authority of law derives from its source, the ability to execute it, and its efficacy, rather than on some moral or ethical grounds like the preservation of human rights.²⁵

Legal positivism boasts of foremost philosophers like Jeremy Bentham,²⁶ John Austin,²⁷ and Hart.²⁸ In Austin's theory of law, law is a command of the sovereign.²⁹ That people obey the law which emanates from the sovereign³⁰ because the sovereign enforces compliance through the threat of punishment. The sovereign however, is not bound by his own command (law) or subject to any other (external) command. The effect of Austin's theory is that law derives its authority from its source (the sovereign) rather than the content.³¹

Hart's approach to defining law differed from Austin's. His work, 'The Concept of Law'³² was devoted to answering the question 'What is law?'³³ Hart argued that there are internal and external dimensions to rule compliance. While external dimensions (or factors) are focused on the 'observable regularities of behaviour', the internal factors explain why people obey the law in effective legal systems.³⁴ Internal factors illustrate why individuals 'feel bound by the law' and people develop a sense of 'obligation to obey the law' rather than feel 'obliged to obey it'

²³Internet Encyclopedia of Philosophy A peer reviewed academic resource available at <http://www.iep.utm.edu/legalpos/> (accessed on 09/03/2015).

²⁴Ibid.

²⁵Ibid.

²⁶(1748- 1832) who promoted the utilitarian philosophy of law. See Internet Encyclopedia of Philosophy A peer Reviewed Academic Resource <http://www.iep.utm.edu/bentham/> (Accessed on 09/03/2015).

²⁷(1790-1859).

²⁸Lacey N 'A life of H. L. A. Hart: The nightmare and the noble dream' (2004).

²⁹Austin J *The Province of Jurisprudence Determined* (1832) available at <http://www.koeblergerhard.de/Fontes/AustinJohnTheprovinceofjurisprudencedetermined1832.pdf> (accessed on 17/02/2015) 6-7. See Hart, *The concept of law* (1961) 1-2. See also Singh R 'Hart's concept of law and justice' (2006/2007) 35 & 36 BLJ 126. See Christie G 'The model of principles' (1968) DLJ, 549-550.

³⁰Hart *ibid* at 23-24, 50-60 and 134.

³¹Austin note 29.

³²Hart *op cit* note 29.

³³Ibid.

³⁴Ibid 79-88.

because they have internalised it, or as Hart described it, they have an ‘internal point of view’ about the law that engenders a sense of obligation to comply with it.³⁵

According to Hart, in order to answer the question – ‘What is law’ – several attempts have been made by eminent legal practitioners, jurists and academics. A few of these attempts are:

- “‘what officials do about disputes is ... the law itself’”,³⁶
- “‘the prophecies of what the courts would do’”,³⁷
- “‘Statutes are ‘sources of law... not parts of the law itself’”.³⁸

These do not really reflect what law is but are simply a few features of law which do not cover all that it constitutes.³⁹

Holmes defined law as ‘prophecies of what the courts would do’.⁴⁰ Arguably, this definition anticipated Woodman’s view that what courts declare to be the applicable customary law does in fact become law even when it differs from the lived normative practices of the people.⁴¹ This discrepancy results in the establishment of parallel normative systems as state and non-state law. The problem with this is that both systems – the actual customary practices and the official version of customary law – become simultaneously binding, and potentially create a false impression of legal certainty with regards to official versions of customary law.⁴² This anomaly accentuates the need for clarity about the meaning and nature of customary law, and how it can be identified. Notwithstanding these divergences in the views related above, they offer useful reflections regarding how rules of customary law emerge.⁴³ Hence a brief look at the statutory definitions of customary law is necessary.

³⁵ Ibid. Christie note 29 at 650-1.

³⁶ Llewellyn, *The Bramble Bush* 2nd edition (1951) 9 cited in Hart op cit note 29 at 1.

³⁷ Wendell O ‘The path of the Law’ in *Collected Papers* (1920) p. 173 cited in Hart ibid.

³⁸ Gray J *The Nature and Sources of Law* (1902) s. 276. Also cited in Hart ibid.

³⁹ Hart op cit note 29 at 1-2.

⁴⁰ Elias op cit note 1 at 38- 42. See also Hart note 29 at 1.

⁴¹ Woodman G R ‘Some realism about customary law-the West African experience’ (1969) 128 WLR 145.

⁴² Woodman ibid

⁴³ Hart note 29 at 4.

2.2.1 The dilemma of defining customary law

Defining customary law requires delineating the sense in which the term has been used because anthropologists, lawyers, judges and others who take an interest in customary law provide different contextual understandings of the term.⁴⁴ A clear understanding of what needs to be defined is also important because it goes to the heart of determining what medium/method ought to be applied when ascertaining customary law and whether the outcome of such processes of ascertainment reflects or captures the lived realities of the subjects over whom the customs hold sway.

It is therefore important to consider statutory and judicial definitions of customary law in order to understand how courts view the normative practices that they are called upon to ascertain. Statutory definitions do not necessarily depict customary law accurately as the lived realities of the people to whom it applies. Therefore, courts that rely on faulty definition to ascertain the applicable customary law in a dispute set off on a wrong premise, and end up ascertaining and applying something other than the customary law that the parties in the dispute actually recognise as normative.

To buttress this point, King explained that a writer's definition of law forms the 'basic concept' of his jurisprudence; in other words, his theoretical model of a legal system upon which he carries out his dissertation.⁴⁵ In this context, for the legally trained lawyer/judge, ostensibly trained under a common or civil law legal system, it may simply be a set of 'rules of law' akin to what he is familiar with by virtue of his training. The sociologist and anthropologist, are 'more concerned with the interaction between law and the social and political system of a people, and in any case recognize that legal relationships are but a part of the total relationships between individuals in a society.'⁴⁶ Even within the various courts actors like the judge adjudicating a case, the lawyer's counsel to his client and even the 'academic lawyer'

⁴⁴ By the Editor 'Customary law: its place and meaning in contemporary African legal systems' (1965) 9.2 JAL 82. See also White C 'African customary law: The problem of concept and definition' (1965) 9 JAL 86.

⁴⁵ King B 'The basic concept of Professor Hart's jurisprudence The Norm out of the Bottle' (1963) CLJ.270 & 273.

⁴⁶ Ibid.

embarking on a field research, customary law can be viewed differently.⁴⁷ What is vital for this thesis however is what is eventually enforced by the court⁴⁸ of which the court must get right.

2.2.1.1 *The implication of the definition of customary law under South African law*

The legislations that define customary law include the South African Law of Evidence Amendment Act⁴⁹ and the Recognition of Customary Marriages Act.⁵⁰ The Law of Evidence Amendment Act uses the term 'indigenous law' and defines it as 'the law or custom as applied by the Black tribes in the Republic'. Although the Act is silent on what would constitute 'law or custom',⁵¹ it can be inferred that 'law and custom' as used in the Act suggests a normativity that confers the status of law. This is the plausible sense to draw from the requirement in s 1 (2) of the Act that either party may lead evidence with respect to the 'substance of a legal rule'.⁵² Section 1 of the Recognition of Customary Marriages Act⁵³ defines customary law to mean the 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.' No definition is given in the Traditional Leadership and Governance Framework Act⁵⁴ of the terms 'customary law' and 'custom' even though there are several references to the words since part of the duties of the traditional leaders is the application of customary law in disputes before them.

The 1996 Constitution does not define customary law. It contains provisions that recognize and refer to customary law as a source of law, and acknowledges its existence in a number of ways. It gives recognition to traditional institutions and authorities that apply customary law⁵⁵ and protects individuals from being discriminated against on the basis of their culture.⁵⁶ It preserves the rights of individuals and of cultural, linguistic and religious

⁴⁷ The Editor op cit note 44 at 83.

⁴⁸ Ibid.

⁴⁹ No 45 of 1988.

⁵⁰ No 49 of 1996.

⁵¹ Section 1 (1) & (4). Law of Evidence Amendment Act.

⁵² Section 1 (2).

⁵³ 120 of 1998

⁵⁴ 41 of 2003.

⁵⁵ Section 211 & 212.

⁵⁶ Section 9 (3) of 1996 South African Constitution.

communities to speak a language or practice a culture or religion of their choice.⁵⁷ The only limitation to enjoying these rights is that they must be exercised in a manner that is consistent with other provisions of the Constitution.⁵⁸

Provisions that make specific requirements regarding customary law can also be found in the Constitution. According to s 39 for instance, courts, tribunals and other fora must promote the 'spirit, purport and objects of the Bill of Rights' when developing customary law,⁵⁹ and may not interpret the Bill of Rights to 'deny the existence of rights or freedom that are conferred or recognised by ... customary law in so far as the rights or freedom are consistent with the Bill'.⁶⁰ In s 212(1) & (2) also, the Constitution acknowledges the existence of traditional institutions and authorities that are established and regulated by customary law.⁶¹ Subsection (3) of the provision states that customary law must be applied by the courts where applicable, subject however to the provisions of the Constitution and legislation.⁶² In s 315, the Constitution established 'The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' to ensure the continued existence of these cultures.⁶³ It is vital to state at this early stage that customary rights exist and according to Nhlapo, some of them 'coincide' with the Western notion of human rights and some do not but they are not necessarily inimical to individuals and the society.⁶⁴

In sum, the implication of the definition of customary law under South African law is that it is broad enough to accommodate the distinctive features of customary law and it is also not restrictive to cut out practices that would be termed as customary law.

⁵⁷Section 30 & 31.

⁵⁸Section 30 & 31.

⁵⁹Section 39 (2).

⁶⁰Section 39 (3).

⁶¹Section 211 (1) (2).

⁶²Section 211 (3).

⁶³Section 185.

⁶⁴Nhlapo 'The African family and women's rights' friends or foes?" in (1991) AJ140.

2.2.1.2 The implication of the definition of customary law under Nigerian law

The Nigerian Constitution acknowledges the existence of customary law by establishing customary courts of appeal and vesting them with jurisdiction over customary law matters.⁶⁵ It also requires that at least three of the justices of the Court of Appeal must be versed in customary law for the purpose of hearing appeals on customary law disputes.⁶⁶ Based on the principle of constitutional supremacy, the application of customary law is subject to the provisions of the constitution.⁶⁷

The Evidence Act of Nigeria uses terms like ‘customary law or custom’,⁶⁸ and, ‘customary law and custom’.⁶⁹ It defines ‘custom’ as ‘a rule which, in a particular district, has, from long usage, obtained the force of law’.⁷⁰ It offers no definition for the term ‘customary law’. The obvious intent of this statutory provision is to confer the force of law on customs that have enjoyed long usage. Extrapolating semantically therefore, it may be suggested that under Nigerian Evidence Act, ‘customs’ and ‘customary law’ can be used interchangeably. This definition is not broad enough to accommodate practices that would amount to customary law by the restriction of the phrase ‘long usage’. Of particular interest at this juncture, is the form of customary law that the courts enforce. To understand that form however, it is important to discuss the concept of living customary law.

2.2.2 The concept of living customary law

Eugen Ehrlich, who is known for elucidating the concept of living law, explained that what constitutes law in a society must not exclude laws that exist in the people’s every day experience.⁷¹ In other words, law is not limited to legal rules that originate exclusively from the State.⁷² It extends to what lawyers consider as ‘non-legal social norms’ that do not fit into

⁶⁵Section 6 (5) (h) & (i) 1999 Nigerian Constitution.

⁶⁶Section 237 (2) (b) Ibid. The Court of Appeal hears appeals from the decisions of the Customary Court of Appeal.

⁶⁷Section 315.

⁶⁸Section 68 Evidence Act 2011 Nigeria.

⁶⁹Section 70.

⁷⁰Section 258.

⁷¹Cotierrel R ‘Ehrlich at the edge of empire: Centres and peripheries in legal studies’ in Hertogh M (ed) *Living Law Reconsidering Eugene Ehrlich* (2009) OISLS 4.

⁷²Menski W *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 2 ed (2006) 92.

conventional descriptions of hard law.⁷³ Since Erlich's exposition, the concept of living law has been used by many scholars in diverse contexts such as Moore in her concept of 'semi-autonomous social field' explained above. The concept formed the basis for the work of the American realist Roscoe Pound and a number of legal anthropologists.⁷⁴

In Pound's view, law is 'the body of authoritative grounds for decisions'.⁷⁵ Applied in the present context, Pound's view explains the authoritative basis of a judicial decision that is grounded in customary law. Thus, even when the state does not officially recognise indigenous law, it would retain its essential character as living law. Calma also echoed the concept of living law when he described aboriginal customary law as organic. In his words, aboriginal customary law is 'not frozen in the past, but a living, changing system that reflects its times, and will continue to grow and change, just as the common law continues to grow and change'.⁷⁶

Sociologist, lawyers and anthropologists reveal the following features of customary law. It is largely unwritten,⁷⁷ and consists of rules that are binding on those who are subject to them.⁷⁸ They are binding because a majority of the members of a particular ethnic community accepts them to be binding,⁷⁹ or to regulate their behaviour, and to be enforced as such.⁸⁰ Typically where the customary law has been in usage for a long time and has not changed, then it remains binding. However, long usage is no longer an indispensable requirement.⁸¹ The important element in this regard, is that customary law evolves and is 'flexible and pragmatic'.⁸² Living customary law is never rigid, and this is what distinguishes it from official versions of

⁷³Cotierrel note 71.

⁷⁴Erlich E *Fundamental Principles of the Sociology of Law* (2009) xxxix

⁷⁵McManaman L J. 'Social engineering: The legal philosophy of Roscoe Pound,' (2013) 33:1 SJLR 13.

⁷⁶Calma T 'The integration of customary law into the Australian legal system' available at <https://www.humanrights.gov.au/news/speeches/integration-customary-law-australian-legal-system-calma> (accessed on 15/02/2015) para 25.

⁷⁷Malemi E *The Nigerian Legal System Text and Cases* (2012) 27.

⁷⁸Bennett T W *Application of Customary Law in Southern Africa* (1985) 17.

⁷⁹Ibid.

⁸⁰*Eshugbayi Eleko v Government of Nigeria* (1931) AC 662 at 673. In *Owoniye v Omotosho* (1961) 1 All NLR 304 Bairamian F J defined customary law as 'a mirror of accepted usage.'

⁸¹Osbourn C J held in *D W Lewis & Ors v Bankole & Ors*(1909) 1 that the customary law it is meant to apply to cases before it must be one that is currently being practiced and 'not the native law or custom of ancient times'.

⁸²Bennett T *Source Book* note 9 at 194. See also the case of *Mabuza v Mbatha*. Packard J S alludes to this in his judgement in the famous case of *D W Lewis & Ors v Bankole & Ors*. Commenting on its flexible nature, he said it is constantly affected by 'motives of expediency' and it indisputably adapts to new circumstances while still maintaining its 'individual characteristics'.

customary law. Some of what serves as official versions of customary law are 'bounded by the rigidities of invented traditions'⁸³ and, when applied by courts, have resulted in the application of distortions.⁸⁴

The concept of living customary law is enshrined as state law in South Africa through the constitutional provision that affirms it as 'an original source of law at par' with other sources of law.⁸⁵ In the *Mabena v Letsoalo*,⁸⁶ the high court of South Africa affirmed the concept when it held per Du Plessis J that 'living law [denotes] law actually observed by African communities'⁸⁷ and that this, rather than official statements (or versions) of customary law is what courts have an obligation to ascertain and enforce in disputes involving customary law.

The same concept of living customary law has also been affirmed in Nigeria since 1909. In the Nigerian case of *Lewis v Bankole*, where the court held that customary law 'must be *existing* native law or custom and not the native law or custom of ancient times...' (Emphasis added).⁸⁸ In *KharieZaidan v Fatima Mohsen*⁸⁹ also, the Supreme Court defined customary law as 'any system of law [that is neither common law nor statutory law], but which is enforceable and binding within Nigeria as between the parties subject to its sway'. In *Oyewunmi & Anor v Ogunesan*,⁹⁰ the Supreme Court had this to say about customary law:

⁸³Ranger, T. "The invention of tradition revisited: the case of colonial Africa." (2014) *Occasional Paper* 11, 5-50, 6 & 13. See also Bennett *Source Book* op cit note 9 at 48.

⁸⁴Mnisi-Weeks' research conducted in 2008 revealed a disparity between the court's decision with respect to customary law of succession in South Africa and the actual lived practices of the people of Mantjolo Community. See Mnisi S *Interface between Living Customary Law of Succession and South African State Law* being a thesis submitted for the award of the degree DPhil at New College Oxford Trinity Term 2009. More recent example Himonga C & Moore E *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015).

⁸⁵*Shilubana v Mwamitwa* supra note 8 para 54. See Himonga C 'The future of living customary law in African legal systems in the twenty-first century and beyond, with special reference to South Africa' in Fenrich J, Galizzi P & Higgins T E (eds) *The Future of African Customary Law* (2011) 41. See also Badejogbin R E 'Interplay of the customary law of testacy and statutory regulation of intestacy with respect to the transfer of customary law rights in land in South Africa' (2014/2015) 4.1 SADCLJ 14.

⁸⁶1998 (2) SA 1068 (T).

⁸⁷Appears to be the first South African case in which the concept was used.

⁸⁸(1909) at 1. The fundamental rights/bill of rights contained in the Constitutions of both countries should be used as the standard for the application of customary law rather than the repugnancy test doctrine which is said to have outlived its usefulness. This is especially for South Africa where customary law has been acknowledged as a distinct source of law.

⁸⁹(1971) UILR (Pt. II) 283 at 292.

⁹⁰(1990) 3 NWLR (part 137) 207 E-F.

Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, is regulatory in that it controls the lives and transactions of the community subject to it.

This thesis will maintain that it is this organic version of customary law that ought to be ascertained and applied.

2.2.3 Customary law terminologies

As stated in the previous chapter, customary law goes by different labels that introduce some confusion regarding the content of customary law.

2.2.3.1 Custom

It is not unusual to see 'custom' and 'customary law' being used interchangeably. Schapera, writing on the Tswana customary law distinguished mere customary rules from legal rules that are capable of being enforced by the tribal courts.⁹¹ For Kerr, 'law and custom' refers to the 'system of law as a whole'.⁹² However, 'custom' also describes social habits or habitual practices that are observed out of some sense of social obligation, without being legally binding or enforceable.⁹³ The ability of custom in this context to conform behaviour to certain social expectations is distinguishable from the 'custom' in Kerr's 'system of law as a whole', which alludes to legally binding norms. In this thesis, it is used interchangeably with customary law unless indicated.

2.2.3.2 Culture

There are different definitions of the term culture.⁹⁴ According to Kerr, 'culture and law are not synonymous'.⁹⁵ He argues that the makers and enactors of the South African Constitution

⁹¹Schapera I *A Handbook of Tswana Law and Custom* (1955) 2nd ed 35-37.

⁹²Kerr A *The customary law of immovable property and of Succession* 3rd ed (1990) 16 & 17.

⁹³Malemi op cit note 77 at 27.

⁹⁴ This challenge has been attributed to the 'general usages of the term'. Spencer-Oatley writes that 'In 1952, the American anthropologists, Kroeber and Kluckhohn, critically reviewed concepts and definitions of culture, and compiled a list of 164 different definitions. Apte (1994: 2001), writing in the ten-volume Encyclopedia of Language and Linguistics, summarized the problem as follows: "Despite a century of efforts to define culture adequately, there was in the early 1990s no agreement among anthropologists regarding its nature."' See Spencer-Oatley, H

‘treated culture and law as different from each other’ and he therefore differs from the opinion of Himonga and Bosch that customary law is one of the constituents of culture and that culture as used in s. 30 of the Constitution demands ‘the application of the living customary law rather than the official customary law ...’⁹⁶ This thesis’ position aligns with the view that customary law forms part of culture. In the Recognition of Customary Marriages Act,⁹⁷ which Kerr referred to, customary law is defined as the ‘customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples’.

This definition suggests that a people’s culture includes legally binding customs. As far as customary marriages in South Africa are concerned, the Recognition of Customary Marriages Act subsumes customs and usages relating to marriage under culture. For the purpose of this thesis particularly, culture is taken to include the customary law applicable to the people. Myburg⁹⁸ adopts this position and it is also buttressed by Ayinla’s views about African philosophy of law, that law is an essential portion of African culture and it cannot be separated from it since culture for the African encompasses the entirety of the different aspects of their lives.⁹⁹ Similarly, in *Du Plessis and Ors v De Klerk and Anor*,¹⁰⁰ the South African Constitutional Court¹⁰¹ held that s 31 of the South African Constitution,

[E]ven if interpreted narrowly as guarding only the individual’s freedom of cultural affiliation, would appear to require that customary law, which remains integral to the domestic culture of millions of South Africans, be accorded due respect.

‘What is culture? A compilation of quotations’ (2012) Global PAD Core Concepts. Available at Global PAD Open House <http://go.warwick.ac.uk/globalpadintercultural> p. 1

⁹⁵ Kerr op cit note 92.

⁹⁶ See Bennett T W *Human Rights and African Customary Law*, (1995) 24 where he discussed the right to culture as entitling people to claim the application of their customary law.

⁹⁷ Section 1 120 of 1998.

⁹⁸ Myburg A *Papers on Indigenous Law in Southern Africa* (1985) 50. Sindiso Mnisi speaking about the Mbuzi community she researched said the people see their customary law as ‘entwined with culture and tradition’ see Mnisi *Interface* op cit note 84.

⁹⁹ Ayinla L ‘African philosophy of law: a critique’ (2002) 6 JICL 150.

¹⁰⁰ (CCT8/95) [1996] ZACC 10 para 174.

¹⁰¹ Section 31 provides that ‘(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights’.

The only reference to culture in the Nigerian Constitution is in the chapter on 'the Fundamental Objectives and Directives Principles of State Policy'. According to s 20(a), the State shall 'protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives as provided in this Chapter'.¹⁰² Even though this section is non-justiciable and cannot be enforced in a court of law in Nigeria, it remains a principle of State policy to guide relations between the State and its citizens. The protection of the right to culture in sections 30 and 31 of the South African Constitution, and, section 20 (a) of the Nigerian Constitution includes customary law.

2.2.4 Sources of customary law in Nigeria and South Africa

The sources of customary law differ from community to community, depending on the pattern upon which the community is framed.¹⁰³ Indigenous African political systems differ. Elias broadly categorises them into a centralised system of government with a paramount ruler and the decentralised (acephalous) where elders and respected members of the society are bestowed leadership roles. Therefore each political system may have different sources of customary law.¹⁰⁴ According to Kerr, the sources of customary law include legislation, precedent, articles, custom, notes, commission reports, legal texts, and the records of anthropologists.

The sources of customary law relied upon by courts in more recent times in the process of ascertainment and application based on the cases analysed and interviews conducted are more or less similar to these ones and include the communities themselves with the main distinction being the seeming underlying consciousness of the courts to view customary law in its own right as 'an original source of law'.¹⁰⁵ Kerr however omits the main source which is the community itself from which the customary law derives and which all other sources are subject to.

¹⁰²Section 21 (a) of the 1999 Nigerian Constitution.

¹⁰³Elias note 1 at 8.

¹⁰⁴Ibid at 14-21.

¹⁰⁵*Shilubana v Mwamitwa* supra note 8 para 54.

So far, this section explained that even though the positivist and state centralist systems practiced in Nigeria and South Africa through their laws and courts view customary law as law on the sole basis that it is so acknowledged by the state, customary law is actually law without such acknowledgement. The way it is defined by statute could cut out practices that constitute living customary law and that it must be viewed as beyond legal rules to include sociological and anthropological perspectives. It is only then that the court can know what to ascertain and apply to cases before it. Having discussed the conceptualization of customary law as utilised in this research, the discussion gives a purview of how judicial discretion can be exercised with respect to it.

2.3 Judicial discretion: problematizing the ascertainment and application of customary law by formal courts

This thesis analyzes the process of ascertainment and application of customary law based on the doctrine of judicial discretion under positivism. Hart's extensive analysis of judicial discretion is relevant here due to the profound impact of his analysis in the theory of law and the doctrine of judicial discretion. Divergent views on judicial discretion based on other theories such as formalism and realism are also analysed and all these are done against the background of the concept and conceptualization of customary law under legal pluralism extensively discussed under 2.2 above. The reference to Hart's postulations on judicial discretion is limited to how it impacts this thesis on the process of ascertaining and applying customary law in court

The analysis of the application of judicial discretion to the ascertainment and application of customary law is undertaken by first, applying the concept and conceptualization of customary law to Harts concept of law, to see whether or not and to what extent Hart's hypothesis can be applied to it. This is also connected to the challenge that arises from the consideration of whether the utilization of judicial discretion in the process of ascertaining and applying customary law actually aid and justify what is ascertained by the courts. While the expositions of judicial discretion were made in relation to positivist laws, they find relevance and application in this thesis for the simple reason that the laws that regulate the ascertainment and application of customary law by the courts classify as positivist law. Both

legal systems are positivistic, and the judges of all the courts researched aside from the chiefs and headmen were trained under this ideology.

2.3.1 Preface to judicial discretion

It is important to first present the main points of Hart's postulations. His views about judicial discretion are tied to his 'concept of rules'. While Hart's theory of law falls short of acknowledging a customary law legal system, his analysis of judicial discretion to an extent, reveals useful contribution to the process of ascertaining and applying customary law by courts.

According to him, a legal system consists of primary and secondary rules that prescribe how things ought to be done.¹⁰⁶ Primary rules prescribe dos and don'ts, while secondary rules regulate procedures for identifying, applying, modifying and interpreting primary rules. Both primary and secondary rules are social in nature, and comprise of social practices that have become normative.¹⁰⁷ Primary and secondary rules exist in a complementary relationship in Hart's 'concept of law'. While primary rules establish standards, secondary rules provide an authoritative mechanism for identifying and enforcing compliance with those standards.¹⁰⁸ They 'confer power, public or private ... or lay down rules governing the composition of powers of courts, legislatures and other official bodies.'¹⁰⁹ In Hart's words,

[S]econdary rules specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined. Secondary rules are chiefly procedural and remedial, and embrace not only the rules governing sanctions but also go far beyond them. Furthermore, these rules also extend to the rules of judicial procedure, evidence and the rules governing the procedure for new legislation.¹¹⁰

Thus, secondary rules respond to issues about which public authority has responsibilities for making, amending and interpreting the law.¹¹¹ Underpinning these rules is what Hart called the 'rule of recognition', the ultimate secondary rule to which all rules and the exercise of

¹⁰⁶Hart op cit note 29 at 79, 89, 96; Christie op cit note 29 at 651. King op cit note 45 at 290

¹⁰⁷Hart ibid at 91-92. Singh op cit note 29.

Hart ibid. Singh Ibid.

¹⁰⁹Ibid.

¹¹⁰Hart op cit note 29 at 91. Singh ibid at 129.

¹¹¹Christie op cit note 29.

public power must conform.¹¹² This rule eliminates uncertainty by prescribing how a public official can identify and accept a primary rule as applying to the particular community.¹¹³ It equally regulates the weight or level of priority that may be attached to a particular primary rule, depending on whether the primary rule is laid down by the constitution, legislation or case law, or whether it is a rule of requirement of customary practice.¹¹⁴ It reveals why a law is accepted by the people which is either because the constitution provides for it or because the legislature makes provision for it etc. and, which of its sources should have hegemony over the other.¹¹⁵

It is important at this stage, to state the defects in Harts assertions concerning customary law in order to appropriately respond to some preliminary issues before engaging the doctrine of judicial discretion. First, while Hart acknowledges that law exists outside state law, he erred in classifying customary law as existing only in a pre-legal society because, according to him, customary law lacks an essential complement of secondary rules, which are necessary for determining what the primary rules are with certainty, and what their scope ought to be. Secondly, Hart inferably argued, using the concept of a secondary rule of change which regulates how laws change, that customary law lacks a legislative mechanism (Parliament) for abolishing, modifying or amending and replacing old primary rules with new ones.¹¹⁶

Lastly, and having regard to resolving disputes, Hart also inferably argued that customary law offered no mechanisms. As such, customary law must rely on social pressure alone to enforce compliance, which is grossly insufficient. Put differently, Hart argued that customary law lacked a secondary rule for adjudicating disputes, which empowers certain individuals to ascertain and issue authoritative statements regarding whether a rule or the other has been violated, prescribe an adjudicatory procedure that must be followed, and define the various characters, functions and processes of the adjudicatory process.¹¹⁷

¹¹²Hart op cit note 29 at 92-93. Christie *ibid*.

¹¹³Hart *ibid* at 98. Van Blerk *A Jurisprudence An Introduction* (1999).

¹¹⁴Hart *ibid*. See also van Blerk *ibid* at 41.

¹¹⁵Hart *ibid*. See also van Blerk *ibid*.

¹¹⁶ Hart *ibid* at 90-91, Singh op cit note 29 at 129.

¹¹⁷Hart *ibid* at 94. Singh *Ibid*.

This thesis states here that the nature of customary law as law has long been established and contradicts Hart's assertions. He described societies with only primary rules as lacking the necessary formal institutions for organising and regulating its social, legal and political affairs.¹¹⁸ Such shortcomings of the pre-legal society may only be remedied by secondary rules.¹¹⁹ However, the relationship between primary and secondary rules is not necessarily as Hart describes it for all indigenous societies in Nigeria and South Africa. Premised on paragraph 2.2 above, African customary legal systems cannot be evaluated by Western construct about law and society, and to do this is problematic because such constructs fail to comprehend the very unique nature of African societies, the organization of their political and judicial systems, how normative practices evolve into rules that have binding effect, and their equally unique way of sanctioning deviation from those rules. In other words, enforcing the rules of customary law is not only driven by social pressure, and therefore arbitrary as Hart argued.

Having regard to pre and post-colonial societies in Nigeria and South Africa, there have always been different levels of sophistication in how traditional institutions were organized.¹²⁰ While they may not show the levels of sophistication and formal organisation that Hart portrayed, they were no less effective than modern legal systems in maintaining social order.¹²¹ Indeed, it may be argued that secondary rules do not necessarily have to take the particular form that Hart conceptualized.

Despite this flaw in Hart's analysis of customary law, his thesis on judicial discretion is still relevant because it applies to the courts operative in Nigeria and South Africa which have the responsibility of applying customary law to disputes before them. This is because these courts are established and legitimated by the state operating legal systems akin to Hart's

¹¹⁸Hart *ibid* at 91.

¹¹⁹ Singh *op cit* note 29 at 131. Hund claimed that small-scale societies like the Tswana lack institutions that can accommodate the operation of secondary rules. See Hund J 'Customary law is what the people say it is' — H.L.A. Hart's contribution to legal anthropology' (1998) 84:3 APLSP 432. Hund based his assumptions on the evidence presented by Comaroff and Roberts. See p 433.

¹²⁰ Bennett *Application of Customary Law* note 78 at 76. See also Okany *The Role of Customary Courts in Nigeria* (1984) 3.

¹²¹ An example is the efficiency of traditional judicial institutions. See Allott A N, Epstein A L & Gluckman M 'Procedures: Proceedings and Evidence in African Customary Law' in Gluckman (ed) *Ideas and Procedures in African Customary Law* Oxford University Press (1969) 22.

extrapolations and they exercise judicial discretion in the process of ascertaining and applying customary law.

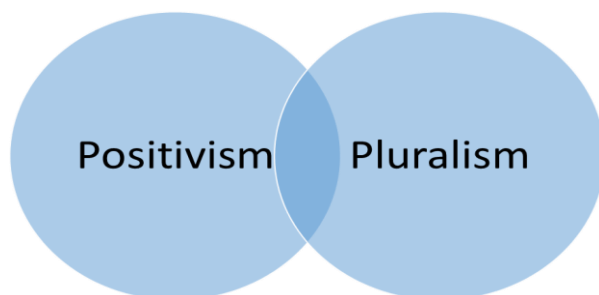
In Nigeria and South Africa, courts habitually resort to judicial discretion when dealing with customary law disputes. The question they grapple with in such disputes is what the primary rule (creating a duty or obligation) and its exact scope is. For theoretical purposes, subtle differences must be pointed out between judicial discretion when applying official customary law and judicial discretion when applying living customary law. Hart's positivism explains the interactions between primary and secondary rules that are established and enforced by state institutions (i.e. state-law). It may accordingly be argued that customary law rules that have been officially recognized through codification, legislation and case law have become state law in Hart's legal society. Under this circumstance, the courts apply customary law as positivist law because they exist within the state system, and possess secondary rules as extrapolated by Hart. Nonetheless, this thesis maintains that outside the state institutions, customary law does have secondary rules and when it is treated as positivist law, it alters its nature.

With regards to living customary law however, a different maneuvering is required of the courts as they navigate through options before them to exercise judicial discretion to ascertain and apply them. This is because since living customary law is not certain, it creates a problem for Hart's position and this is discussed below. This also applies where the living customary law has been captured in written form as state law because the certainty it projects extract from its flexibility.

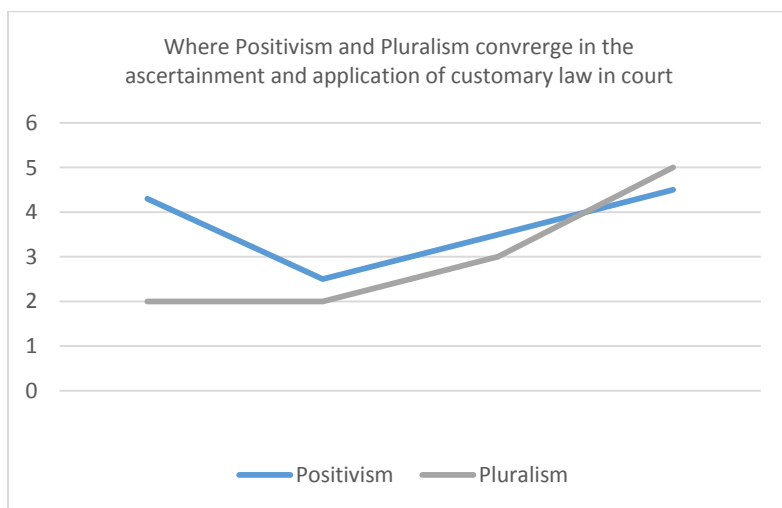
Another point is the fact that living customary law has its own secondary rules which is the basis upon which it should be applied. Where the process of ascertaining and applying it is regulated by the state, the state's secondary rules must acknowledge the secondary rules of the living customary law in the utilization of its (the State's) secondary rules. It is only then that the application of the state's secondary rules is justifiable. Taken together, a theoretical approach to discussing judicial discretion in customary law adjudication reveals interactions between positivism and legal pluralism where customary law is forced to be dependent on

positivism. The interactions are like what Moore described as interdependence in semi-autonomous societies.¹²²

The analysis of relevant legal doctrines by positivists applies to the process of ascertainment and application adopted by the courts in Nigeria and South Africa since this is regulated by positivist law.



The meeting of Positivism and Pluralism in the process of ascertainment and application of customary law.



2.3.2 Judicial discretion as a doctrine

Having established that though Hart's doctrine is positivistic, it finds application in the way customary law is ascertained and applied by formal courts. It is vital to explain what it is and how it is applied. To do this will also entail the examination of other theories.

¹²² Moore S F 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7.4 LSR 720.

Black's law dictionary explains the exercise of judicial discretion as an act which is –

[B]ounded by the rules and principles of the law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances.¹²³

This thesis argues that however noble these concepts are, how they apply to the ascertainment and application of customary law with particular reference to the nature of customary law¹²⁴ will determine the justification of their utilization.

Judicial discretion describes an area of judicial autonomy, free from the constraints of legal rules, where 'the judge can exercise his or her judgment in relation to the particular circumstances of the case'.¹²⁵ The idea of judicial discretion can be traced to the time of Aristotle with respect to the role of the judge¹²⁶ and it still applies today. A major contributor to the debate of how courts exercise judicial discretion in cases before them is Hart. He states that judges exercise discretion in determining what rules to apply in a case before them under a number of circumstances within prescribed parameters.¹²⁷ This thesis argues that these circumstances also cover customary law disputes since they are regulated by state institutions.

Ascertaining the content of the customary law to be applied to a given case can be herculean because courts are often confronted with more than one version of customary law, the credibility of which they must determine in order to arrive at the actual practices of the people. To determine the applicable custom, the court must exercise some degree of discretion, using certain parameters that point to the particular normative practice of the people to arrive at the right version of customary law.

¹²³Black's Law Dictionary 6th edition West Publishing Co. 1990.

¹²⁴Berat L 'Customary law in a new South Africa: A proposal' (1991) 1 FILJ 97.

¹²⁵Lacey W 'Judicial discretion and human rights: expanding the role of international law in the domestic sphere' (2004) 5 MJIL 3.

¹²⁶Hoffmaster B 'Understanding judicial discretion' 1.1 LP 21. In which he cited Rhetoric, Book I, (1374) Chapter 13, b 20-21.

¹²⁷Hart note 29 at 138-142, 149-150. This opinion is also held by the following authors Dorf M 'Requiem for a hedgehog: Ronald Dworkin R.I.P.' in *Dorf on the Law - Law, Politics, Economics and More from Michael Dorf, Neil Buchanan, Sherry Colb, and occasionally Others* (2013) available at <http://www.dorfonlaw.org/2013/02/requiem-for-hedgehog.html> (accessed on 10/02/2015); Green M S 'Legal realism as theory of law' (1968) 46.6p W&MLR 1918. See also Christie op cit note 29. See also Forsyth C & Schiller J 'The judicial process, positivism and civil liberty II' in Woodman G R & Obilade A O *African Law and Theory* 421-423.

Legislation, the rules of evidence, rules of court procedure, precedents and the inherent powers of a court all clothe the judge with the power to exercise discretion.¹²⁸ It is therefore important to examine how the exercise of discretion aids the ascertainment and application of living customary law by answering questions of how discretion is exercised, and how the exercise of judicial discretion justifies the court's choice of a version of customary law where they vary with living customary law. Judges have exercised this discretion either mildly, widely or somewhere in between and this is discussed below.

Two other legal concepts, formalism (a positivist concept) and American realism also known as rule skepticism,¹²⁹ take different views about judicial discretion. Formalism is a theory which states that legal rules are detached from social and political institutions.¹³⁰ 'According to this theory, once lawmakers produce rules, judges apply them to the facts of a case without regard to social interests and public policy.'¹³¹ Legal formalism believes that 'there is always one "correct" answer to legal problems that can be reached using the internal tools of the subject primarily logic, precedent, and rules ... {without any reference to} extra-legal policy considerations'.¹³²

Formalists, like Langdell Ronald Dworkin, Robert Bork and Justice Scalia¹³³ argue that judges only apply the law as it is to the facts in a dispute through deductive reasoning, and may not be creative in their interpretations of it and therefore do not apply discretion and when they do, it is very mildly done.¹³⁴ Legal formalism is founded on the premise that lawmaking

¹²⁸Aldrich S & Cass M 'Judicial discretion: Melding messy facts and pristine Law' <http://mnbenchbar.com/2013/11/judicial-discretion/> (accessed on 04/03/2015). See s 173 1996 South African Constitution which states that the 'Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.' See also s 6 (6)(a) of the 1999 Constitution of Nigeria which states that the 'judicial powers vested in accordance with the foregoing provisions of this section ...shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law'.

¹²⁹Which thrived in the 1920s & 30s in law schools in Yale and Columbia.

¹³⁰Peters C J 'Legal formalism, procedural principles, and judicial constraint in American adjudication' Switzerland in Pineschi L (ed.), *General Principles of Law - The Role of the Judiciary* (2015) 24.

¹³¹Cornell University Law School Legal Information Institute https://www.law.cornell.edu/wex/legal_formalism (accessed on 14/05/2015).

¹³²Chiang T J 'Formalism, Realism, and Patent Scope' (2010) 1.1 IPT 90.

¹³³Leiter B 'Legal formalism and legal realism: what is the issue?' Electronic copy available at: <http://ssrn.com/abstract=1646110> (accessed on 14/05/2015) 2. See also Dworkin R *taking Rights Seriously* (1977).

¹³⁴Posner R 'Legal formalism, legal realism, and the interpretation of statutes and the constitution' (1986-7) 37:2 CWRLR.

involves different socio-political factors that lawmakers are better equipped to take into consideration when making law, following the proper process. Judges, who according to formalists are not equipped to consider such factors, should restrict themselves to simply applying the law as it is to facts; and this would achieve 'certainty, stability, and predictability to the law'.¹³⁵ To do otherwise would be assuming responsibility for lawmaking and this would amount to usurping the legislature's role in a democracy.¹³⁶ However, the consequence of such a formalistic legal theory is rigidity, which may exclude developing the law in particular instances that are not specifically provided for by law,¹³⁷ and, stultify customary law.

Legal realism on the other hand is a 'theory that all law derives from prevailing social interests and public policy'.¹³⁸ 'According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case'¹³⁹ and discretion is exercised widely. This position is held by legal realists such as Jerome Frank, Karl Llewellyn,¹⁴⁰ Underhill Moore, Herman Oliphant, Wendel Holmes, Roscoe Pound, and Benjamin Cardozo.¹⁴¹ Consistent with this view, judges can make law.¹⁴² They assert that the court is the paramount source of law, and other sources of law are simply guides for the court to follow.¹⁴³ However, a criticism of legal realism is that it engenders uncertainty regarding what legal rules apply in specific circumstances¹⁴⁴ and may result in judicial dictatorship as exercising judicial discretion may result in choices of law clearly not intended by lawmakers.¹⁴⁵ The implication of these doctrines to living customary law is explained here.

¹³⁵Babish D 'Legal Realism, Legal Formalism, and Judge Sotomayor' <http://www.breakpoint.org/tp-home/blog-archives/recent-point-posts/entry/4/7348> (accessed on 14/05/2015). See also Winerib E 'Legal formalism; on the immanent rationality of law' (1988) 97:6 YLJ 953-956.

¹³⁶Leiter op cit note 133 at 3

¹³⁷Hart op cit note 29 at 121-150. See also <http://www.angelfire.com/md2/timewarp/hart.html> (accessed on 21/02/2015.) See Quevedo S 'Formalist and instrumentalist legal reasoning and legal theory' (1985) 73:1:3 CLR 121.

¹³⁸Green M S 'Legal Realism as Theory of Law' (2005) 46 W & MLR 11817-1818.

¹³⁹Cornell University Law School Legal Information Institute https://www.law.cornell.edu/wex/legal_realism (accessed on 14/05/2015).

¹⁴⁰Quevedo op cit note 137 at 121 footnote 5. See also Postner R 'How judges think' (2008).

¹⁴¹Leiter op cit note 132 at 3 & 5.

¹⁴²Legal Information Institute Cornell University Law School op cit note 139.

¹⁴³Neil M *H L A Hart* 2nd ed (2008) 154.

¹⁴⁴Hart op cit note 29 at 121-150. See also <http://www.angelfire.com/md2/timewarp/hart.html> (accessed on 21/02/2015).

¹⁴⁵Hart Ibid at 131

This thesis, like Hart's, differs from the excesses of formalism and realism.¹⁴⁶ While it agrees with Hart that the correct position lies between the two, it makes distinctions from Hart's position. Hart argued that law exists only because 'general rules, standards and principles' of conduct can be adequately communicated as the focal tool of social control to a majority of people in a community. This is done through 'authoritative verbal language' (legislation) and by 'example' (precedent) respectively. He states that both are open to uncertainties but this is more with precedents where uncertainty cannot be completely eliminated. He further explained that language is too limited to cover all situations that may occur under a rule. Therefore, the person (i.e., the judge) called upon to apply the legislation and/or precedent to a particular circumstance, is left with wide latitude in deciding to what extent the circumstance before him/her fits into the circumstance communicated. The person exercises wide discretion even when he or she makes a choice within the communicated rules.

Judicial discretion is necessary because as Roland argued, '[w]hat guidance the law cannot provide is supposed to be provided by standard principles of justice and due process, reason, and the facts of each case.'¹⁴⁷ Where guidance is missing in the law, the judge applies his/her mind to how the standard principles *ought to* apply to the facts to bring about a rational outcome that is the better option of any number of choices he/she must make, and which serves the interests of justice. Judicial discretion is a necessary part of this rational process.¹⁴⁸

The thesis also agrees with Hart's questioning the practicalities of formalism on the ground that different factors in legal reasoning determine how legal rules are applied. As with Hart's position, this thesis confirms that there are instances where how legislation applies to a specific circumstance is unclear and this is said to be open textured.¹⁴⁹ The thesis confirms that legislation, however excellent its language may never envisage the entire range of situations or conduct that may come under its scope and this produces uncertainties¹⁵⁰ and fosters the application of wide discretion. In addition, is that legislation introduces rigidity by providing for

¹⁴⁶ Ibid 144 at 121 – 123, 124.

¹⁴⁷ Roland J 'Abuse of judicial discretion'

http://www.constitution.org/abus/discretion/judicial/judicial_discretion.htm (accessed on 04/03/2015).

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid at 125-128.

specific circumstances while eliminating others, thereby falling short of conveying the real intention of the communication. One instance, is the South African Reform of Customary Law of Succession and Regulation of Related Matters Act.¹⁵¹ It was enacted to provide for customary law intestate succession but excluded customary law testacy by the implication of its rigid provisions that confines the application of the Act to the absence of statutory testacy.¹⁵²

Even though Hart's reference to legislation here is with respect to positivism, this thesis, for reasons earlier given, applies it to legislations of customary law and makes these points on the assumption that the legislations properly captured living customary law. Where it failed to properly capture living customary law, it hinders its ascertainment and application. This is on the ground that the premise upon which the discretion exercised by the judge already fails to represent the true content of the living customary law.

It is important to note that a wide range of discretion is also exercised by the judge even if the legislation provides for the application of living customary law if such legislation does not state the customary rule but subjects the exercise of legal rights to the 'the applicable customary law'. In such an instance, the applicable customary law would have to be ascertained outside the legislation which is silent on its content and a wide range of discretion is left for the judge to ascertain and apply same.¹⁵³ Legislation is but one method out of several of ascertaining customary law and how these methods operate opens the judge to a wide range of discretion.¹⁵⁴

The thesis agrees with Hart that judicial precedents are also open textured.¹⁵⁵ They involve 'creative judicial activity' that may create outcomes that differ from the intention of the legislature. Courts may limit or deviate from a rule or precedent by recognising exceptions from which they exclude the application of the rule of precedent. They may also expand the scope of a rule of precedent in order to make it apply to a situation that is not covered by a statute or

¹⁵¹No 11 of 2009.

¹⁵²Section (1) (4) (b). See also R E Badejogbin 'Interplay of the customary law of testacy and statutory regulation of intestacy with respect to the transfer of customary law rights in land in South Africa' (2015) 4:1 SADCLJ 11-25.

¹⁵³Examples of such legislations are the South African Reform of Customary Marriage Act and the various Wills Law applicable in most of the States in Nigeria such as the Wills Law Lagos State Cap.W2 Laws of Lagos State 2004.Wills Law Kaduna State Cap.163 Laws of Kaduna State 1991.Wills Law Bendel State Cap.172 Laws of Bendel State 1976.

¹⁵⁴Each of these methods is discussed in chapter four and they present their own range of challenges.

¹⁵⁵Hart op cit note 29 at 131, 132, 141, 143 & 150.

earlier precedent. Courts therefore have a vital role to play in developing the parameters of 'open textured' rules on a case by case basis. They necessarily apply a wide scope of discretion in this process. Hence, vital and extensive areas are left to the exercise of judicial discretion in courts' judgment whether it is within the 'plain' or 'debatable' borders of the rules. The courts' rulings become binding until they are reversed by a subsequent legislation that the court also has the power to interpret.

Thus, in his criticism of legal realism, Hart argued that courts merely set limits to the open texture of the law and may exercise discretion when doing so but may only operate within the borders of the written text of the law. This thesis agrees with Hart's argument here only to the extent that it leads to the ascertainment and application of living customary law and will explain how this can be achieved.

This thesis differs from Hart by first stating that his analogies of legislation and precedent, if applied to customary law, are restricted to official customary law and have some degree of certainty which detracts from the nature of customary law in which certainty is not a value.¹⁵⁶ Granted that the law should be stated in clear and precise terms to avoid arbitrariness,¹⁵⁷ this thesis faults the adoption of official customary law in a bid to achieve certainty rather than plod the murky waters of ascertaining the actual norm that currently applies to the community. Hart's analysis did not contemplate living customary law, and the fact is that the content of living customary law is not readily available for application as in his scenario but must be determined by the court. Hart's analysis becomes relevant at the point where living customary law has been determined. Prior to that, the court engages in a form of exercise of discretion as it considers evidence put before it to determine the content of the living customary law to a depth not envisaged by Hart. This is because here, the discretion that needs to be applied is first to ascertain the content of the applicable living customary law in the case, and then to determine how it will be applied to the case which includes whether it should

¹⁵⁶Bennett T W *Human Rights and African Customary Law under the South African Constitution* (1997) 63. See also the case of *Mabuza v Mbatha* (1939/01) [2002] ZAWCHC 11. Himonga C 'African customary law in South Africa – The many faces of Bhe v Magistrate Khayelitsha' (2005) RA 178.

¹⁵⁷Bennett Ibid.

be developed to accommodate constitutional principles and be put through the so-called repugnancy and public policy tests or otherwise.

Dworkin criticized Hart on the ground that he failed to recognize the distinction between rules which on one hand are specific and apply directly to particular issues, and, principles and policies on the other hand which give direction of a general nature. These principles permit the application of very minimal discretion in certain instances that may not precisely fall under the application of the rules.¹⁵⁸

Critics of Dworkin's position include King who asserts that judges exercise a wide range of discretion where there are no applicable rules to be applied by the judge and where the judge sees the need to take a new position from his earlier decision in a new case.¹⁵⁹ Raz criticized Dworkin's stance on mild discretion and states that there are matters where there are no single current answers even where the judges are 'legally entitled to decide' and in such instances, the judge can exercise 'strong' discretion.¹⁶⁰ Christie also states that what Dworkin calls principles more likely fit as rules and not all judges will decide a case in the same way¹⁶¹ thus entailing the exercise of wide discretion. For various reasons, different judges may at the end of a case, decide the cases differently based on their respective personalities.¹⁶²

By rules, Dworkin means statutes and precedents which are positivistic. Regardless of the debate on the distinction between rules and principles, the question that arises is since more than one principle is usually utilised in a case, what happens when the judge has to choose which of the competing principles to apply or how much weight should be given to the applicable principles in a case?¹⁶³ In such instances, discretion will still have to be exercised which will fit as wide.

This thesis admits that there are circumstances where mild discretion is applied by the court in an aspect of its adjudication as stated by formalism. This is where the court simply

¹⁵⁸Dworkin op cit note 133 at 22, 31 & 32. Hart, 135. Even Dworkin admits that, while it may be practically feasible, it is nevertheless difficult for a rule to comprehensively define all the exceptions thereto. See King note 45 at 5. Singh op cit note 116.

¹⁵⁹King ibid at 5 & 16.

¹⁶⁰Raz J 'Legal Principles and the limits of law,' (1972) 81 YLS 843.

¹⁶¹Christie op cit note 29 at 2.

¹⁶²Ibid.

¹⁶³Ibid.

needs to apply official customary law that appropriately ascertained the content of the applicable living customary law albeit subject to the limitations associated with such form as discussed in chapter four of this thesis. However, there are several instances where wide discretion is applied. With respect to realism, this thesis confirms that the judges do generally exercise wide discretion in the ascertainment and application of customary law even to the extent envisaged by realism. Extraneous factors other than the black letter law such as institutional, substantive, socio-economic and political, and, procedural factors as discussed in details in chapters five, six and seven have a bearing on how courts exercise discretion sometimes to the point of ignoring the black letter law.

With respect to official customary law, while formalism will achieve rigidity, realism may go outside the purview of the customary rule applicable in the circumstance. With regard to living customary law which Hart's analysis did not cover, since state law subjects it to the same process of ascertainment, it is exposed to similar risks as the official versions and more. Where the living norm conflicts with the official, according to formalism, the living will be sacrificed for the official. According to realism, even though there is more room for the living to be ascertained, developed where necessary and applied through the judge's discretion, the living norm may be ignored based on the range of the judge's discretion.

With respect to customary law whether official or living, the challenge is threefold. The first challenge has to do with ascertaining the content of the applicable customary law in a given dispute. The second challenge involves situations where gaps exist in a customary law that has been judicially ascertained in a given case, or contained in written form such that it does not directly relate to the unique circumstances of a dispute. The pattern of customary law adjudication suggests that the more distant the facts of a dispute are from the circumstances contemplated by a rule of customary law, the more likely that the judge will develop or apply some other legal rule to fill the gap.¹⁶⁴ The third challenge is where it is necessary to develop customary law and bring it to conformity with constitutional provisions.

¹⁶⁴Ibid. Christie also holds this position but his analogy however is with reference to positivist law and does not contemplate customary law but is useful here because the data on the process of ascertainment and application of customary law utilised by the thesis supports this.

To deal with gaps in the law as stated above, most positivists – including Christie and Hart – argue that the judge must exercise some legislative function in order to discharge his/her judicial function. In other words, he/she must exercise some discretion in making a choice of the applicable rule in order to decide the outcome of the case, based on his/her judgment.¹⁶⁵ This thesis asserts like Hart that discretion must be exercised within the limit of the applicable legal rules.

That is there must be self-restraining mechanisms that ensure that judges do not overstep the boundaries of the law to develop rules or create rights and obligations that are altogether unknown to the law. This thesis however differs from him with regards to the circumstances where discretion can be applied. For instance, with respect to judicial notice, and, evidence of facts placed before the court both as means of proving customary law. That is where the court ascertains distortions rather than living customary law from the evidence placed before it and where the application of the judicially noticed customary norm conflict with the credible evidence of the applicable living customary law (which is benign).¹⁶⁶ Here, the exercise of discretion by the judge where it leads away from the application of living customary law is not justiciable because it violates the Constitutional right to culture in those countries with this kind of provision in the constitution. This is especially so where it is stated in the legislation that the legislation was enacted to enhance the application of customary law.

It is important to note that in customary law disputes, ascertaining and applying the applicable living customary law goes to the root of whether or not justice is achieved in the case. Isaacs has argued in support of the inevitability of the exercise of discretion, because the law, which consists of rules, principles and standards cannot be applied to factual situations without the use of discretion.¹⁶⁷ However, he cautioned that the exercise of judicial discretion can affect both adjectival and substantive rights, even when the discretion was merely employed to resolve a question of the applicable procedure.¹⁶⁸ This calls for limits and

¹⁶⁵ Ibid.

¹⁶⁶ That is it does not violate any rule of human rights.

¹⁶⁷ Isaacs N 'The limits of judicial discretion' (2015) YLJ 345.

¹⁶⁸ Ibid 346

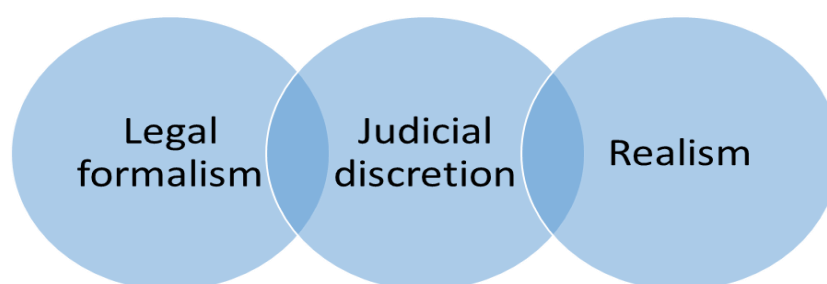
conditions within which discretion may be exercised, in order not to produce arbitrary outcomes that frustrate the achievement of substantial justice.¹⁶⁹

With respect to proving customary law as fact through evidence, the exercise of discretion by the judge is necessarily wide with respect to gaps, the need to develop customary law, and where there is uncertainty as to what version to accept especially given the nature of customary law which requires contextual application. This thesis argues that under these circumstances, the exercise of the judge's discretion in the ascertainment and application of customary law is also only justifiable where it leads to the ascertainment of living customary law. These positions are buttressed by the fact that living customary law must be given the environment to thrive in light of the reality of pluralism in Nigeria and South Africa in the inevitable regulation of its application by positivist and pluralist laws. The application of positivist law in the ascertainment and application of living customary law must have as its primary aim, the survival and preservation of customary law which must be paramount albeit subject to the preservation of inalienable rights. Consequently, this thesis argues that where an official version contradicts the living version proved before the court, the judge must take advantage of every possible rule and principle within the valid confines of his/her power to reject the rigid positivist rules of procedure and decide in favour of the living version and where necessary, to develop same in line with the constitution where applicable.

In ascertaining and applying living customary law, this thesis asserts that courts sometimes exercise wide discretion outside the confines of evidential and procedural rules and that this leads away from the ascertainment and application of living customary law.

¹⁶⁹Ibid 252. The exercise of discretion in Nigerian courts is done when the law to be applied in the case is either blurred or has gaps, where there are more than one version presented in evidence, and where it does not cover the particular circumstance of the case which leads to the court creating new principles, rules and standards. How discretion is exercised is determined by the law, principles of law, conventions that created them, and, the context of the particular case'. The exercise of discretion by the courts must be 'judicial and judicious' meaning it must be within the bounds prescribed by the law and based on 'good judgement' with the aim of achieving justice. Isaacs explained that the exercise of discretion can be reversed by appellate courts where it was done outside the limitations of the law, and, justice was not achieved in the case. Kana AA 'Perspectives and limits of judicial discretion in Nigerian courts' (2014) 29 JLP 157 & 159. See Ajani B A 'The nature of judicial process in Anglo-Nigerian jurisprudence' (2016) available at SSRN:<https://ssrn.com/abstract=2742586> or <http://dx.doi.org/10.2139/ssrn.2742586> (accessed on 14/01/2016) 158-160 & 166. *African Continental Bank v Nangana* (1991) 4 NWLR (Pt. 186) 486. See also *State v. Duke* (2003) 5 NWLR (Pt. 813) 394. *Queen v. Onyedire* (1961) 1 ALL NLR 642.

Sometimes this wide discretion (in line with realist views) is as a result of the misapplication of the rules of evidence due to incompetence and lack of credibility. This thesis also asserts that courts also sometimes exercise mild or wide discretion within the confines of these rules and the degree to which this is done is contextual. The court may sometimes need to stretch further within the confines of these rules to confirm the contents of the applicable living customary law. The thesis submits that there are factors internal and external to court rules, procedures and the judicial institution identified in the subsequent chapters that influence how the discretion of the judge is exercised. These may aid or hinder the ascertainment and application of living customary law and must be addressed to enhance the ascertainment and application of living customary law. It is vital to state at this stage that this thesis' engagement with judicial discretion is limited to its utilisation by the courts in the ascertainment and application of customary law and what factors influence its exercise by judges.



Meeting point of Judicial Discretion with Legal Formalism and Realism

2.4 Conclusion

This chapter discussed the context in which customary law is used in this thesis in its conceptualization based on the theory of legal pluralism which states that law can exist outside state institutions. This is despite the fact that the application of positivist law in the ascertainment and application of customary law in Nigeria and South Africa cannot be ignored. It also addressed the challenge of how customary law is defined in the statutes of both countries which for South Africa gives room for the concept of living customary law and

all its features. For Nigeria however, its definition would impede the concept of living customary law and its sources. The doctrine of judicial discretion was discussed as it relates to the ascertainment and application of customary law under legal positivism engaging Hart's postulations as well as the broad positions of formalism and realism. The chapter asserts that Hart's exclusion of customary law as law is faulty and explained the basis for this. The chapter contends that the exercise of discretion by the judges must ensure that the status of customary law as law is preserved. It asserts that courts may sometimes need to within the confines of applicable rules stretch further to give consideration to the unique nature of customary law in order to confirm the contents of the applicable living customary law. It is only then that the exercise of judicial discretion in the ascertainment and application of customary law can be justified. The chapter also asserts that a number of factors determine how this discretion is exercised in the process of ascertainment¹⁷⁰ which leads us to discussions on the process of ascertainment and application of customary law in Nigeria and South Africa in the next chapter.

¹⁷⁰This is discussed in Part III.

PART B

The Process of Ascertainment of Customary Law.

Chapter Three

The Process of Ascertainment of Customary Law by Formal Courts – Judicial Notice

3.1 Introduction

The process of ascertainment and application of customary law in Nigerian and South African courts engages two statutorily prescribed approaches which are judicial notice and proof as facts through evidence. These approaches utilise the different methods of ascertainment discussed in chapter four. Exploring these processes/approaches and methods in this section is an attempt to give a clear picture of what transpires in court. This chapter focuses on judicial notice. Proof as facts through evidence is discussed in chapter four.

The chapter elucidates the rules that guide the judge as he/she exercises discretion in the process of ascertainment and application of customary law through judicial notice, as well as the challenges that affect this approach. The various courts with jurisdiction to ascertain and apply customary law matters are also discussed

The chapter begins with a brief narration of the historical context of these challenges which began under the colonial administration of natives in Nigeria and South Africa. The history of the usage of the various methods of ascertainment is discussed in chapter four which deals with the methods.

3.2 Brief historical context of the ascertainment and application of customary law

How customary law is ascertained and applied in courts today is influenced by how the courts operated under colonial rule because it laid the foundation for the current practice. This influence is in the area of the conceptualization of customary law fostered by the nature and structure of the courts with jurisdiction to hear customary law matters. It also includes the knowledge of the judges in customary law.

During colonial times, the ascertainment and application of customary law did not fare well under the system of indirect rule adopted by Lord Lugard to aid British administration of

Africa.¹ The establishment of formal courts and commissions to exercise jurisdiction alongside traditional institutions born out of the need to retain colonial control created problems with respect to ascertainment and invariably, its application. The discussion on conceptualisation of customary law in the preceding chapter explains the challenge of Eurocentric interpretation of customary norms. This challenge was fostered by the colonial system under which formal institutions either directly heard cases of customary law, or exercised supervisory powers of review and/or appeal over decisions of the local adjudicators.² The reviews were done on the basis of the principles of English law and this resulted in decisions that departed from indigenous customary law.³

The challenges that also ensued during these times included the establishment of English-styled courts and pseudo-native courts to hear cases of customary law which were not necessarily manned by appropriate traditional leaders and custodians of the customs for Nigeria and South Africa.⁴ Traditional rulers were also excluded from the English styled customary courts.⁵ The personnel who applied customary law in these courts lacked formal training in customary law.⁶ These contributed to the undermining of customary norms that did not resonate with the Judge's Eurocentric views.⁷ Customary law rules established by these courts through their decisions served as precedents.

Another challenge that affected the ascertainment and application of customary law during colonial times was the chronicle of events and legislative developments on the administration of civil and customary law.⁸ There were haphazard engagements with customary

¹Britain governed the colonies indirectly through their traditional institutions that maintained local traditions. See Bennett T W *Application of Customary law in Southern Africa* (1985) 39. See also Costa A 'Custom and common sense: The Zulu royal family succession dispute of the 1940s' University of the Witwatersrand Institute for advanced Social Research Seminar paper in the Richard Ward Building seventh Floor 7003 on 6th May, 1996 2.

²Bennett *ibid*.

³*Ibid* at 40.

⁴Keay E A& Richardson S *The Native and customary Courts of Nigeria* (1966) 8 - 10. Native Courts Proclamation 1900 No. 9 of 1900. The Chief Judge commented in his Amalgamation Memorandum that the native courts in southern Nigeria were not native courts. The judges were known to apply English law or their own views of English law in matters that required the application of customary law. See also Bennett *op cit* note 1 at 47 - 48.

⁵In Southern Nigeria. See Okany M *The Role of Customary Courts in Nigeria* (1984) 8. See also Keay& Richardson *Ibid*. See the Native Courts Proclamation 1900 No. 9 of 1900.

⁶Bennett *op cit* at note 1. Keay *ibid*.

⁷Bennett *op cit* note 1 at 40.

⁸Bekker J C *Seymour's Customary Law in Southern Africa* (1989) 1.

law that ensued in the different colonies in Nigeria and South Africa. This is because inroads into the colonies and protectorates occurred at different times and different laws regulating the recognition of customary law applied to these colonies. The consequence is that they did not foster a uniform experience within each country in which simultaneous challenges faced by the courts in the colonies would have enabled a garnering of progressive strides towards enhancing the ascertainment and application of customary law. The nature of courts with jurisdiction to hear customary law cases determined how it was ascertained and applied. According to Bennett, The Native Administration Act enacted after the 1910 Union of South Africa eventually unified the various approaches that were adopted by Transvaal, Natal, Orange Free State and Bechuanaland. It prescribed uniformity across the country with respect to the 'recognition' of customary law and the formation of separate courts for the adjudication of civil cases for Native Africans.⁹

In South Africa, even after the chiefs and headmen's courts were established, they were manned by chiefs and headmen who had been acknowledged by the state and were authorised by the minister to hear civil cases regulated by customary law.¹⁰ They therefore owed allegiance to the colonial administration at the expense of applying customary law when necessary.¹¹ The decisions of these chiefs and headmen's courts were also still subject to the commissioner's courts that were given discretion to also apply subsisting customary law subject to the latest modifications, natural justice or public policy.¹² Further appeals went from the commissioner's courts to the black appeals court and then to the appellate division of the Supreme Court only on grounds of law. These appellate courts were manned by officers or judges with Eurocentric views. This arrangement subsisted until the abolition of the commissioner's courts and the black's appeal courts based on the recommendation of the Hoexter Commission in 1986.¹³ The courts of chiefs and headmen were incorporated into the formal court structure of South African legal system¹⁴ and currently continue to adjudicate on

⁹Bennett *Application of Customary Law* op cit note 1 at 44-7.

¹⁰Ibid at 48..

¹¹Ibid.

¹²Ibid.

¹³Ibid.

¹⁴Bennett ibid at 49.

customary law disputes with their decisions appealable to the magistrate courts up to the Constitutional Court.

The situation was similar in Nigeria. Decisions of the native courts established by the colonial masters were subject to other formal courts headed by non-traditional rulers which were established with jurisdiction to hear customary law matters.¹⁵ This arrangement continued even after the 1914 amalgamation of the northern and southern protectorates of Nigeria.¹⁶ Despite the restructuring of the courts by succeeding heads of government, appeals from these native courts now called customary /area courts are still subject to hierarchies of formal courts who are mainly composed of Eurocentric trained judges. Some of these customary/area courts are headed by qualified legal practitioners.¹⁷

It is important to note however that despite these challenges, in certain instances, there were extensive engagements with customary norms and its conceptions including its ascertainment and application which produced certain notable decisions on customary law such as the case of *Lewis v Bankole*.¹⁸

In summary, how customary law was adjudicated during colonial times created the challenges with how it was ascertained and applied then and has contributed to the current challenge of its ascertainment and application. These challenges are in the conceptualization of customary law fostered by the structure and nature of the courts with jurisdiction to hear customary law matters, the knowledge of the judges, and the policy of the colonial government which did not favour a sincere development of the rules of customary law.

¹⁵ See the Nigerian Protectorate Order in Council 22nd November, 1913 reproduced in Fawehinmi, G. *Court Systems in Nigeria, A Guide* (1992) 2-11. Adewoye, O. *The Judicial System in Southern Nigeria 1854 – 1954*(1977) 137. See also Ogundere J D *The Nigerian Judge and His Court* (1994) 12-13.

¹⁶Adewoye ibid at 137.

¹⁷In Abuja (FCT) all the judges of the customary courts are qualified legal practitioners.

¹⁸(1908) INLR 81.

3.3 Courts with jurisdiction to hear customary court cases

3.3.1. South Africa

South Africa has a dual system of courts comprising courts of chiefs and headmen as customary courts and other courts made up of courts of specialized and of general jurisdiction.¹⁹ The Constitutional Court affirmed in the case of *Recertification of the Constitution of the Republic of South Africa 1996*²⁰ that the courts of chiefs and headmen fall under the categories of courts in the Constitution.²¹

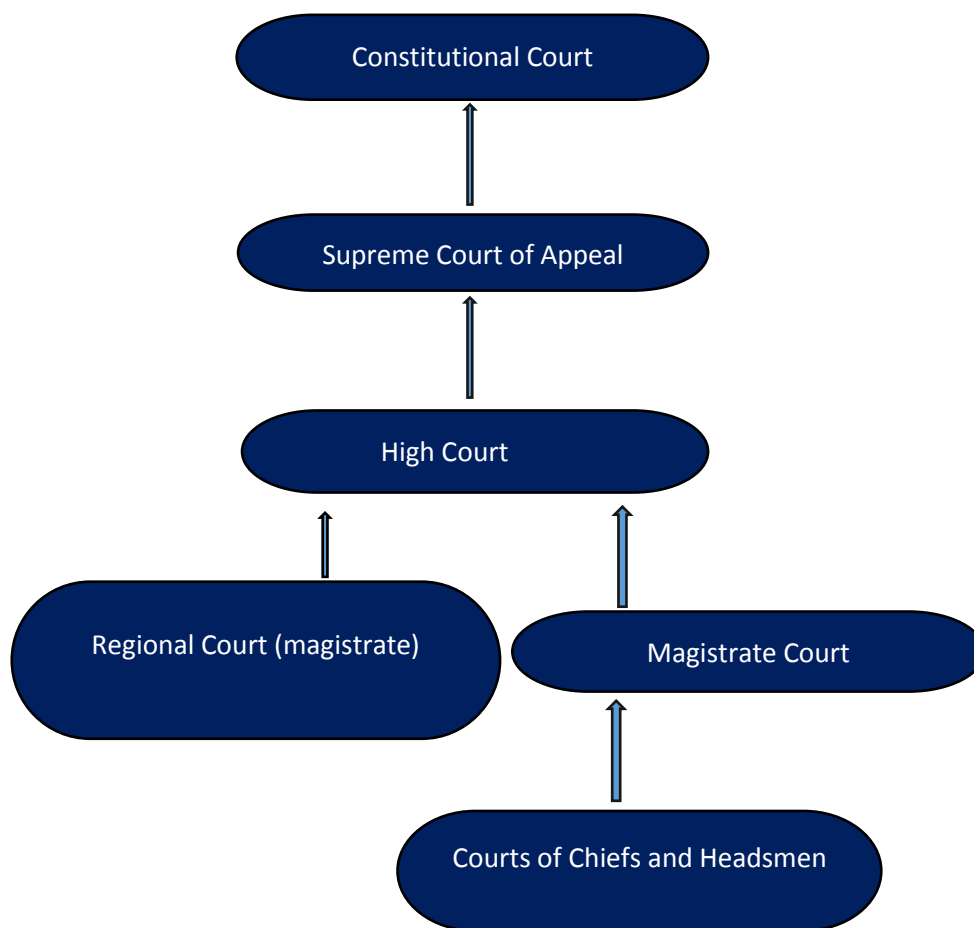
The courts of general jurisdiction entertain matters of customary law. The South African courts that have jurisdiction to hear customary law cases include the Constitutional Court, the Supreme Court of Appeal, the high court, regional court, magistrate courts, as well as other courts established or recognized by an Act of Parliament. These other courts may be similar in status to the high court or magistrate court. The Law of Evidence Amendment Act South Africa provides that any court may take judicial notice of customary law and this includes courts that fall under the last category mentioned here. According to Koyana et al, South Africa's small claims court falls under this category²² and can receive evidence of customary law in land disputes.

¹⁹Berat expressed in her discussion on the transformation process of South Africa after the collapse of Apartheid that customary law being the basis of the dual system of law and courts in South Africa will not be overlooked. See Berat L 'Customary law in a new South Africa: A proposal' (1991) 15.1 ILJ 94.

²⁰(CCT 23/96) [1996] ZACC 26.

²¹This case was instituted to affirm whether the proposals in the then proposed 1996 Constitution were in line with the constitutional policies.

²²Koyana DS, Bekker JC Mqoke RB 'Traditional authority courts' in Rautenbach C, Bekker JC & Goolam NMI *Introduction to Legal Pluralism* (2010) 174.



Courts with jurisdiction in customary law in South Africa²³

3.3.2. Nigeria

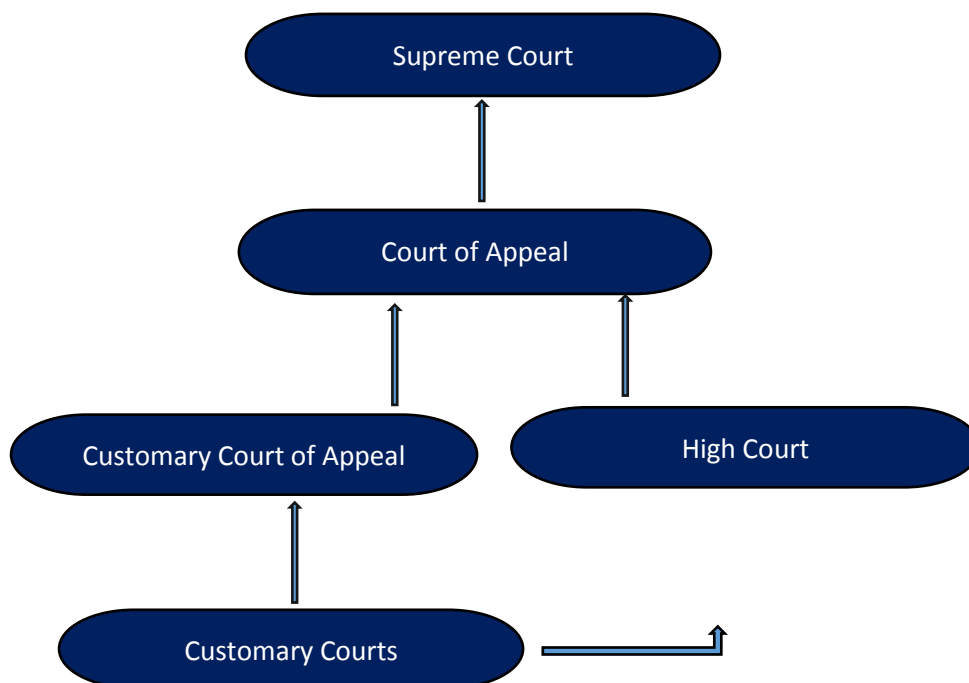
Nigeria operates forms of dual and multiple court systems. At both the federal and state levels, it has customary/area courts and courts of general jurisdiction also empowered to hear cases on customary law. Courts with jurisdiction to hear customary law cases are creations of statutes and the Constitution and are categorised into courts of superior and inferior jurisdictions.

These courts include the Supreme Court of Nigeria, the Court of Appeal, the high courts of the States and the FCT, the customary courts of appeal of the states and the FCT and

²³Other specialised courts with jurisdiction in customary law such as Land Claims court are not included here because this thesis is restricted to the regular courts.

[S]uch other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and such other court as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.²⁴

Customary/area courts fall under the last two categories.



Courts with jurisdiction to hear customary law cases in Nigeria

3.4 The process of ascertainment

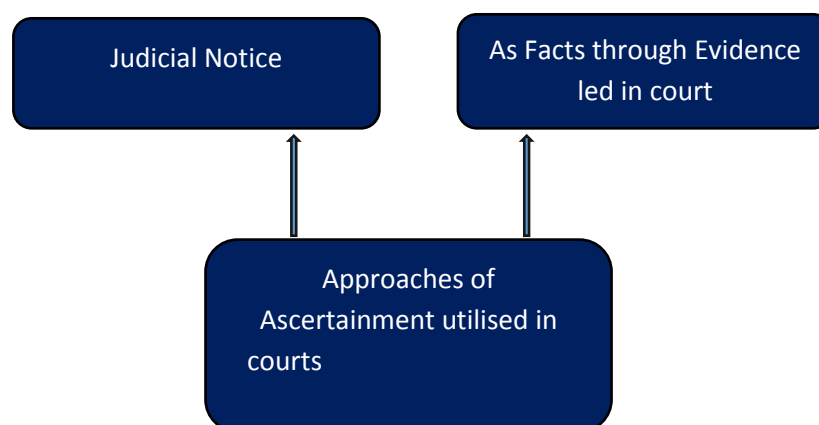
The Black's Law dictionary broadly defines judicial process as including 'all the acts of a court from the beginning to the end of its proceedings in a given cause'.²⁵ The ascertainment of customary law forms part of the judicial process. The process of ascertainment of a legal system entails 'the determination of the conditions in which its rules can be identified and

²⁴Section 6 (5) 1999 Nigerian Constitution.

²⁵Black's law Dictionary 6th edition.

applied in legal proceedings'.²⁶ Ascertaining customary law engages processes that contribute to how the court determines and applies customary law. Here, the power of the judge to exercise discretion is vital and is derived from the rules of evidence, court procedure rules and laws, and the inherent powers of the courts.

In Nigeria and South Africa, the ascertainment of customary law by formal courts is regulated by statute, and the processes are broadly similar, i.e. by judicial notice and proof as facts through evidence. Every court type in Nigeria and South Africa with jurisdiction to hear cases of customary law adopts a process of ascertainment. For customary courts manned by chiefs of the particular locality, the process may be more limited. For instance, where the customary law to be applied is that of the particular community, the chief may not need any external aid in the ascertainment and application. Relying on his/her knowledge is a process. So also is conferring with his/her council of elders on what may be areas of uncertainty with respect to the ascertainment of the content of the law to be applied to the sets of facts before the court. The processes for the different courts are discussed in this chapter and, in chapter four.



²⁶Himonga C, Nhlapo T, Maithufi I, Mnisi-Weeks S, Mofokeng L & Ndimba D. *African Customary Law in South Africa Post-Apartheid and Living Customary Law Perspectives* (2014) 58.

3.4.1 Nigeria

In Nigeria, the process of ascertaining customary law is regulated by the Evidence Act, procedural rules of courts and the respective laws of particular courts.²⁷ The Evidence Act²⁸ is the main legislation that regulates the judicial ascertainment and application of customary law but it excludes the customary courts of appeal, customary and area courts in its application. This exclusion is however subject to an order by a constitutionally instituted authority allowing the application of all or certain provisions of the Evidence Act. Section 256 (1) (c) of the Act provides that:

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply ... to judicial proceedings in any civil cause or matter in or before any ... Customary Court of Appeal, Area Court or Customary Court unless any authority empowered to do so under the Constitution, by order published in the Gazette, confers upon any or all ... Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory, Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act.

In accordance with this provision, the Federal Capital Territory Customary Court Act²⁹ empowers both the customary court of appeal and the customary courts within the territory to apply certain provisions of the Evidence Act, including provisions that pertain to the ascertainment of customary law.

The Evidence Act provides for two ways of proving customary law in court. According to section 16 (1) '[a] custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed or can be proved to exist by evidence.' Sub section (2) of the provision lays the burden of proving a custom on the person who alleges that the custom exists.

²⁷ The Evidence Act is within the purview of the exclusive legislative list of the National Assembly and therefore it applies to courts within the country. Other Laws and procedural rules are enacted by the respective state legislature. For the Federal Capital Territory however, its procedural rules and laws are enacted by the national assembly.

²⁸ 2011. This Act replaced the Evidence Act cap E 14 laws of the Federation of Nigeria 2004.

²⁹ No 56 of 2007 (FCTCCCA). See section 65 which provides that 'The Customary Court and Customary Court of Appeal FCT Abuja shall in Judicial Proceedings be bound by the provisions of sections 14, 15, 59, 76, 77, 78, 92, 93, 135, 136, 155, 177 and 227 of the Evidence Act.'

Clearly, the probable convergence of statutory law and customary law in the judicial resolution of disputes comes to the fore in section 16 (1), as the provision authorizes the court to also consider customary law among other sources of applicable law. But just as pertinent is the statutory recognition that customary law may apply in resolving a judicial matter if its existence can be proved according to the rules of evidence. It is, as it were, a convergence of positivist law and customary law. Stating that customary law may apply ‘as part of the law’ means that customary law will apply as the substantive law.³⁰ However, statutory and common law will regulate the procedure which includes the processes by which customary law will be ascertained.

Thus, according to the Evidence Act, there are two ways of proving customary law in court. A judge adjudicating a matter in which a rule of customary law has been pleaded may ascertain the rule by judicial notice or by proof of evidence.

In *Orlu v Gogo-Abite*³¹ the Supreme Court held that Ikwere native law and custom of inheritance which was the basis of the Plaintiff’s claim of ownership was not proved in the case and judicial notice of it could not be taken because it had not been notoriously decided. There could well be situations where a court takes judicial notice of some parts of the customary law while requiring proof (facts) about other parts. There is jurisprudential difference between the two methods of ascertainment. Until it is proved (ascertained), the court regards customary law³² as fact rather than as law. Impliedly, it becomes law when its existence has been established through evidence and applied by the court in its judgment. However, when customary law can be judicially noticed, it is viewed by the court as the law on the subject. The customary law proved through evidence is viewed as law only after it is ascertained and applied by the court in its judgment.³³ This, as the legal pluralist may say, is a consequence of centralist views of legal theory. But what, precisely, is judicial notice and when may a court apply it as precedent on a question of customary law?

³⁰Substantive as use here is the sense of substantive as opposed to procedural.

³¹ (2010) 8 NWLR (Pt 1196) 307.

³²Except official versions.

³³Obilade A O *The Nigerian Legal System* (1979) 97.

3.4.1.1 *Judicial notice*

Judicial notice is '[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact.'³⁴ It pertains to the court's power to accept such a fact as law'.³⁵ The doctrine of judicial precedent is integral in the concept of judicial notice. According to the doctrine, the judgment of a superior court can be judicially noticed.³⁶

The basis for judicial notice of customary law was laid out in section 14 of the old Evidence Act, which provided as follows:

A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.³⁷

Section 17 of the current Evidence Act preserves the doctrine. But it simply states that 'A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record.'³⁸ As the provision before it, this provision allows courts to exercise judicial discretion in the matter of taking judicial notice about the existence of a custom. However, the provision seems to establish a single requirement for a custom to be judicially noticed. All it requires is that a superior court has adjudicated on the custom before, and once.³⁹ It would seem this provision dispenses with the old requirements that the custom of which judicial notice is sought to be taken, must have been adjudicated upon to an extent that the court could justify its bindingness in similar circumstances and in the same community. This would seem to suggest lessening of the standard for establishing precedent on an issue of customary law, or for justifying judicial notice thereof.

³⁴ Black's Law Dictionary.

³⁵ Ibid.

³⁶ Section 5 (1) 9a) – (l) & 6 (3) of the 1999 Nigerian Constitution list the superior courts of records to include the high courts and other courts of coordinate jurisdiction in an ascending manner to the Court of Appeal and the Supreme Court.

³⁷ Section 11 (2) *ibid*.

³⁸ Section 17 Evidence Act 2011.

³⁹ This position is also shared by Adangor Z 'What Is Innovative in the Evidence Act, 2011?' (2015) 43 JLP 38-39.

It is important to see how this new provision could constitute a problem. The repealed law gave courts the liberty to determine the extent to which a custom may be justifiably noticed judicially, guided by the stipulation that the custom must have been considered to an extent that justifies the court to presume it is settled law on the matter. The Privy Council's position of this law in the case of *Angu v Attah*⁴⁰ was that for a custom to be judicially noticed, it must have been repeatedly proven in a court of law. This Ghanaian case decided by the Privy Council in 1916 formed the basis upon which customary law was proved in Anglophone Africa including South Africa.⁴¹ The decision offers a reliable standard, as it affirms the agency of a frequentative process that allows scrutiny, evaluation, and sifting until the actual binding rule of custom is determined, and errors are eliminated.

This position was adopted in several Nigerian cases.⁴² In *Olagbemi v Ajagunbade & Anor*,⁴³ there were a number of decisions by the high court and the Court of Appeal supporting the appellant/plaint's claim on ownership of land in Ogbomoso. There was another case on the same subject in which the Supreme Court seemingly deferred from the decisions at both the high court and the Court of Appeal. The judge at the high court considered the evidence led during trial independently from earlier judgements at the high court, Court of Appeal and the Supreme Court and differed from the position of the Supreme Court. The Supreme Court on appeal confirmed the decision of the high court which took judicial notice of the decisions of the earlier high court and Court of Appeal and elaborated that the position expressed in its judgement (at the Supreme Court) was *obiter dictum* of which a judicial notice could not be taken and the *ratio decidendi* was on a different subject and did not apply to the case. It should however be noted that these cases were adjudicated during the pendency of the Evidence Act which required proof to an extent.

There are of course cases where frequent application of a custom does not necessarily confirm its authenticity. In such cases, it may not be justified to take judicial notice of the

⁴⁰ P C (1874-1928) p 43.

⁴¹ Bennett T W *Application of Customary law in Southern Africa* (1985) 19.

⁴² See *Giwa v Erinmilokun* (1961) 1 ALL N.L.R. P. 294 and *Olabanji v Omokewu* (1992) NWLR (Pt. 250)671. See also *Romaine v Romaine* (1992) 4 NWLR 650 where the supreme court cautioned the court on its duty to make further enquiries with respect to the authenticity of the land title of a party to its satisfaction irrespective of the fact that the party may have presented a title document.

⁴³ (1990) LPELR-SC.178/1987.

custom.⁴⁴ However, where a court is satisfied that the process employed by another court to ascertain the authenticity and accuracy of a custom now being contested before it was painstaking and left no stone unturned, the mere fact that the custom had been judicially deliberated upon only once should not prevent the court from taking judicial notice of it.

Thus, in *Cole v Akinjele*,⁴⁵ decided prior to the enactment of the current Evidence Act, the court was called upon to take judicial notice of a Yoruba customary law that entitled children that were born outside wedlock to inherit alongside children born within wedlock. This was on the premise that the father acknowledged paternity while alive. The custom had only been proved in one case – *Alake v Pratt*.⁴⁶ The court (in *Cole*) found that the custom had been satisfactorily proved based on the weight of evidence put before the court in *Alake v Pratt* and took judicial notice of the custom.

The provision of the current Evidence Act requiring that once a custom has been adjudicated upon once by a superior court, it ‘may be judicially noticed’, does not require that it must also justify its application by the judge in the particular case. While it is reasonably expected that a judge would take that into consideration before judicially taking notice of a custom, omitting that in the provision of the statute is amiss. It should be noted that the provision preserves for the courts a considerable berth of discretion on the matter which may be erroneously exercised.

Under the previous Evidence Act, a court may take judicial notice of a custom from a court of co-ordinate jurisdiction as well as from a court of superior jurisdiction meaning that judicial notice can be taken of a judgement of a customary court by another customary court. The current evidence Act limits judicial notice to be taken from only superior courts of record. The implication of this is that the wealth of customary norms ascertained and applied by customary courts may not be utilised through judicial notice even though some of these customary courts outside the FCT are manned by local chiefs who are versed in the customary norms and their decisions may be devoid of Eurocentrism and tend more towards living customary law.

⁴⁴Obilade op cit note 33 at 97.

⁴⁵(1960) 5 FSC 84. See also *Olagbemiro v Ajagunbade III* (1990) NWLR (PT. 136) 37.

⁴⁶(1955) 15 WACA 20.

A court is not necessarily bound to take judicial notice on a customary norm that has been established in a prior judicial process – even if the process was before a court of superior jurisdiction where credible evidence led before the later court with respect to the same circumstances contradicts the finding of the earlier court. The operative word ‘may’ in section 17 of the new Act give the later court the discretion to refrain from taking judicial notice of a customary law even if that law was ascertained by a court with superior jurisdiction. The credible contradictory evidence of the applicable customary law should constitute a justifiable reason to not take judicial notice of a customary law that has been determined by a superior court.

Ordinarily, the principle of judicial precedent compels compliance with the decision of a superior court of record.⁴⁷ However, ‘judicially noticed facts may be rebuttable’.⁴⁸ This would happen where a court with superior jurisdiction erred when ascertaining a customary rule. For example, a court may not judicially notice a customary rule if the facts or issues in the case it which it was previously ascertained are distinguishable from the case at hand. Arguably, where the judicially noticed customary law is made without due regard to actual normative practice and the facts of the particular case, a court should be at liberty to refrain from accepting such in view of fresh credible evidence to the contrary.

When a court fails to appropriately ascertain customary law, it violates the constitutional rights of the people whose rights it is to have their lives regulated by the customary law in question, and to have their disputes resolved according to that custom. It is therefore particularly crucial for courts to ascertain customary law properly as their decisions invariably become precedents or can be judicially noticed.

⁴⁷ This position was recently reinforced by the Supreme Court in *Igwe and Anor v IGP and Ors* (2015) LPELR-24322(SC) pp.2 & 4. However, a court would not follow a precedent where the facts are not similar, or the same point is not in controversy. A court may also overrule its previous decision where that decision was made *per incuriam*, where justice will not be achieved, or where constitutionally bestowed rights will be inhibited, and where it will not enhance appropriate development of the law. See *Johnson v Lawanson* (1971) 1 NMLR. In this case, the Supreme Court departed from the ‘error’ committed in the decision of the Privy Council in *Maurice Goulin v Aminu* (1957) PC Appeal No. 17 of 1957 but sustained that of *Awosanya v Anifowoshe* (1959) 4 F S C 94. See *Ngwo v Monye* (1970) All NLR 91; *Aqua Ltd v Ondo State Sports Council* (1988) 4 NWLR 622; *Mobil Oil v Coker* (1975) ECSLR 175; *Orubu v National Electoral Commission* (1988) 5 NWLR 323. See Asein J O *Introduction to Nigerian Legal System* (2005) 78 & 83.

⁴⁸ Zeffert, Paizes & Skeen op cit note 20 at 717.

By requiring that '[a] custom may be judicially noticed when it has been adjudicated upon once by a superior court of record', section 17 dispenses with the need for parties to prove the facts constituting the customary norm in question. Indeed, according to section 122(1) '[n]o fact of which the court shall take judicial notice under this section needs to be proved'. However, sub-section 122 (2) (I) of the provision seems to introduce ambiguity over what a court shall do with a custom that has been judicially ascertained. The section provides as follows:

The court shall take judicial notice of ... all general customs, rules and principles which have been held to have the force of law in any court established by or under the Constitution and all customs which have been duly certified to and recorded in any such court.

According to subsections (3) and (4) of the provision,⁴⁹ a court may resort to books, documents or references as aids for the purpose of taking judicial notice, and may decline to do so until the party alleging the fact (custom) produces such books or document.

Apparently, subsections (3) and (4) recognise the fact that courts may rely on documentary proof, in addition to the judicial precedent itself, for the purpose of taking judicial notice. It is another layer of evidence intended to ensure that the decision to take judicial notice is rightfully made. Scholarly or other works that document facts or authoritative statements about customary law, especially where those facts have been judicially ascertained and subjected to further anthropological studies, provides more certainty about the authenticity of the alleged custom.

However, as noted above, section 122 is not without problems, especially for living customary law. Subsection (2) employs mandatory language – 'the court *shall* take judicial notice of... all general customs ... held to have the force of law in any court'. The language may appear to take away the discretionary dimension of taking judicial notice as provided for in section 17. The best probable way to reconcile the apparent contradiction between these provisions is to consider section 122 as only requiring that courts take notice of judicial pronouncements on customary law, and to apply them only when they have ascertained that

⁴⁹ Section 122

those pronouncements remain the law on the subject matter. In other words, in so far as sections 17 and 122 go, and as is typically expected of courts when considering precedent, a court in a customary law matter must not only acknowledge precedent, it must determine whether it remains law and is applicable in the instant case. Hence, the provision that courts also consult books, documents and references.

It is this interpretation that preserves the discretion of the court, as, according to section 17, it may take judicial notice, but it is not bound to do so. Courts ordinarily ought to take any judicially noticed fact or custom as the settled 'law' on the issue, but it may be suggested that the Evidence Act takes a unique approach to judicial notice. By inference, subsections (3) and (4) of section 122 bequeath the court with the leeway to consider facts that may suggest that the custom has evolved from what was ascertained in a previous case only if they have books or documents to support this. This, it is argued, will greatly hinder the ascertainment of living customary law and has the potential of promoting official customary law because the living norm may not have been captured in writing and official versions are often contained in written form. Therefore, where a party has reason to dispute the content of a customary law that has been judicially noticed, he should be given the chance to present evidence to the contrary.

The provision of section 1 (2) of the Law of Evidence Amendment Act in South Africa already addresses this by stating that 'the provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.' A similar provision to this in Nigeria is section 16 (1) of the Evidence Act which provides that 'A custom may be adopted as part of the law governing a particular set of admissible circumstances if it can be judicially noticed **or** can be proved to exist by evidence.'⁵⁰

In summary, this section discussed the current provision of the evidence Act and argues that it is broad and gives room for wide discretion by the judge in ascertaining and applying customary law to cases before it by not providing standards and the circumstances to which the court may take judicial notice of customary law. The implication of this is that it provides a wide

⁵⁰Emphasis mine.

field which can be explored by the judge against ascertaining and applying customary law. However, considering the wording of the provisions discussed, the thesis argues that though the courts are bound to adopt judicially noticed facts, they can exercise liberty to deviate from it where credible evidence is proved before it to the contrary. This will enable the courts to utilise this additional evidence to ascertain and apply living customary law.

3.4.2 South Africa

The main legislation regulating the ascertainment and application of customary law by courts in South Africa is the Law of Evidence Amendment Act.⁵¹ This Act does not restrict its application to specific courts but provides that it applies to any court which by implication could include the courts of chiefs and headmen. This is different from the situation in Nigeria. The Act provides two ways in which customary law can be ascertained by the courts. As in Nigeria, they are by judicial notice and by adducing evidence.

3.4.2.1 Judicial notice

By virtue of section 1 (1) of the Law of Evidence Amendment Act, '[a]ny court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty...' This provision gives the courts discretion with respect to how judicial notice should be applied because it does not state the detailed circumstances of how it must be done.⁵² Bekker van Der Merwe states that the provision of the Law of Evidence Amendment Act did give the court the discretion to apply judicial notice in ascertaining customary law and this has been done based on the 'whims and fancies of the whole spectrum of justices'.⁵³

There are divergent positions regarding whether the Act compels courts to take judicial notice of indigenous laws in its process of ascertainment and application with respect to the choice of law rules that relate to the application of customary law and Common law. In *Thibela*

⁵¹No. 45 of 1988.

⁵²Bekker J & Van Der Merwe I 'Proof and ascertainment of the customary law' (2011) 26 SAPL 116-117.

⁵³Ibid at 127.

*v Minister van Wet en Orde*⁵⁴ the Supreme Court of Appeal held that section 1 (1) gave courts no discretion in applying customary law where necessary and is mandatorily required to do so when it is applicable with respect to the choice of law rules between applying either customary law or Common law. Academics like Kerr⁵⁵ and Bennett⁵⁶ have argued that section 1 (1) makes the utilization of judicial notice mandatory while the application of customary law is not mandatorily required.⁵⁷ In other words, while the court may not be compelled to apply customary law, it was mandated to adopt judicially noticed norms of customary law where they are available when applying customary law.

According to Himonga *et al*,⁵⁸ neither the application of customary law nor the utilization of judicial notice is mandated, as the wording of the said provision clearly gives room for the exercise of discretion on the application of customary law and the adoption of judicial notice. However, the court must apply customary law 'where it is applicable'.⁵⁹

The Constitution provides in section 211(3) that 'courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. This section has been explained in the scope of choice of law rules.⁶⁰ That is, where it is determined that customary law is applicable and not statutory or Common law, then it must be applied to the case.⁶¹ Bennett explains that the choice of law rules extend to making a choice 'between different systems of customary laws' (Therefore, based on section 1 (1) of the Law of Evidence Amendment) Act, the courts may utilise judicial notice as an aid to ascertain the content of the applicable customary law where available. Based on the principles of judicial

⁵⁴1995 (3) SA 147 (SCA). In this case, issues on customary law were to be determined by the court. The widow claimed that the deceased who was her husband had adopted her son under customary law during his lifetime.

⁵⁵Kerr A J 'The choice of and the application of customary law' *South African Law Journal* (1996) 113 at 409.

⁵⁶ Bennett T W 'The conflict of laws' in Bekker, Rautenbach & Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2006) 17.

⁵⁷Also mentioned in Himonga *et al* op cit note 26 at 55.

⁵⁸*Ibid*.

⁵⁹*Ibid* at 58 - 60.

⁶⁰ See Bennett T W 'Re-Introducing African Customary Law to the South African Legal System' (2009) 57 AJCL 7 & 8.

⁶¹ Due to the uncertainties in this the Report on Conflicts of Law South African Law Commission Project 90 The Harmonisation of the Common Law and the Indigenous Law recommended that parties should be given the right to make this choice and, in the absence of any choice, it should be left to the discretion of the court available at http://salawreform.justice.gov.za/reports/r_prj90_conflict_1999sep.pdf (accessed on 23/03/2017) p xvi.

notice and judicial precedent, a judge cannot exercise discretion to refrain from taking judicial notice where the circumstances require that he/she does.

The Law of Evidence Amendment Act is however silent on whether a rule of customary law may only be judicially noticed when it has been ascertained by superior courts. A glimpse into the incidence prior to the enactment of the relevant provision of the Law of Evidence Amendment Act gives more light here. According to Bennett, there was a persistent dilemma with respect to the discretion of the magistrate's court to apply customary law and in what circumstances they could do so under section 54 A (1) of the Magistrate's Courts Act⁶² which was not definite and had a lacuna.⁶³ This provision was consequently repealed in 1988 and replaced by section 1 (1) of the Law of Evidence Amendment Act seemingly as a solution to the uncertainty.⁶⁴ Seen from this light, it can be deduced that judicial notice is not restricted to the decisions of superior courts.

The use of the phrase 'Any court may' in Section 1 (1) of the Law of Evidence Amendment Act may be interpreted to mean that the provision of the Act is applicable to the courts of chiefs and headmen. However, another inference that can also be made from the circumstances surrounding its enactment is that the provision may have been made without ever intending that it should apply to courts of chiefs and headmen (i.e. the provision empowering courts to take judicial notice) since it merely sought to address a dilemma faced by the magistrate courts.⁶⁵

Another legislation that regulates judicial notice is the Civil Proceedings Evidence Act⁶⁶ which can also be said to apply to all laws of which customary law is one since it does not specifically exclude it. Section 5(1) of the Act provides that 'Judicial notice shall be taken of any law or government notice or of any other matter which has been published in the Gazette'.⁶⁷ It appears from the use of the disjunctive word 'or' gives the court a choice between official and

⁶² No. 32 of 1944.

⁶³ Bennett *Sourcebook of African Law* (1991)18 & 119.

⁶⁴ Ibid.

⁶⁵ It may be necessary that this provision is amended to state clearly the exclusion of the courts of chiefs and headmen from its application.

⁶⁶ No. 25 of 1965.

⁶⁷ Section 5 (2) provides that 'A copy of the Gazette, or a copy of such law, notice or other matter purporting to be printed under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be'.

living customary law where they differ without giving priority to the official. However, it may be argued that the Constitutional subjection of customary law to legislation states otherwise.

Citing the cases of *Ex parte Minister of Native Affairs: In Ex Parte Minister of Native Affairs in re Yako v Beyi*⁶⁸ and *Morake v Dubedube*⁶⁹ which were decided prior to the enactment of the current amendment to the Law of Evidence Amendment Act, O'Dowd explained that chiefs' and headmen's courts can take judicial notice of native law and custom.⁷⁰ However, should superior courts take judicial notice of customary laws that have been recognized by the courts of chiefs and headmen? Would the superior courts be justified to take judicial notice of decisions of the courts of chiefs and headmen on the ground that the latter are regarded as more versed in customary norms, even though they are subordinate to the superior courts? Further, should courts of chiefs and headmen be bound to take judicial notice of legislated customary laws?

Neither section 1 of the Law of Evidence Amendment Act nor section 5 (1) of the Civil Proceedings Evidence Act (the latter applying to superior courts only) differentiate between a superior and inferior court on the matter of which court may take judicial notice of a decision of another on a question of customary law. This would suggest that other courts may take judicial notice of customary law ascertained by courts of chiefs and headmen. This may indeed be beneficial to the development of customary law. Other courts would have the benefit of taking judicial notice of customary norms that are more likely to have undergone a more accurate process of ascertainment by persons who are custodians of the norms or to whom customary law is a lived reality. This however is subject to the limitations of how the flexibility of customary law is applied contextually. And since what the Constitution recognises is living customary law,⁷¹ to require courts of chiefs and headmen to apply legislated customary law would stymie the evolving nature of the law, and affect legitimacy of the court.

⁶⁸ 1948 AD 388. In this case, with respect to the commissioner's court is 'bound by earlier judgments of the Native Appeal Court', Schreiner states that '[T]he rule of stare decisis should in general be observed.' See Olivier N 'The application of customary law in South African courts: some problems and the future' available at http://reference.sabinet.co.za/webx/access/journal_archive/02586568/540.pdf (accessed on 23/08/2016) 176.

⁶⁹ 1928 TPD 625.

⁷⁰ O'Dowd A P *The Law of Evidence in South Africa* (1963) 104. See also May H J *South African Cases and Statutes on Evidence* (1962) 117 which also has a number of cases on this point.

⁷¹ *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

The Law of Evidence Amendment Act provides that judicial notice of customary law can be taken 'in so far as such law can be ascertained readily and with sufficient certainty'. Though 'customary law' as used here should refer to living customary law, official versions appear to be included as well, having regards to section 5 (1) of the Civil Proceedings Evidence Act. A number of points ensue from this. First, legislated customary law would be judicially noticed because it can be readily made available such as the Reform of Customary Law of Succession and Regulation of Related Matters Act.⁷² The challenge here is that the content of such customary law, where it has been reduced to written form (be they texts, judicial precedent, legislation and other documentary sources like reports of commission, anthropological recordings etc.) may differ from the actual normative practice of the community. The differences may occur because the recordings were made in error or the customary law, though correctly captured at the time it was recorded, may have evolved over time.

Secondly, having regard to section 1(1) of the Law of Evidence Amendment Act, courts may rely on other evidence besides judicial pronouncements for the purpose of taking judicial notice of a customary law, as long as that evidence 'readily' establishes the customary law and 'with sufficient certainty'. This may not necessarily be documentary proof, but may include oral evidence⁷³ which gives the courts the potential of ascertaining and applying living customary law despite the tendency to rely on written materials. Zeffertt *et al* explained that indigenous law is 'capable of being readily ascertained with sufficient certainty' only if the 'courts have access to authoritative sources'.⁷⁴ He made reference to a few cases which included *Harnischfeger Corporation & Another v Appleton & Another*⁷⁵ where the Supreme Court held that materials on a particular foreign law were 'neither readily accessible nor ascertainable with such certainty' because the court's library as well as the library of a nearby university were deficient on them.⁷⁶ Even though his reference is with respect to foreign law, the same

⁷²No. 11 of 2009.

⁷³Himonga *et al* op cit note 26 at 56.

⁷⁴Zeffertt *et al* op cit note 20 at 312.

⁷⁵1993 (4) SA 479 (W).

⁷⁶*Ibid.* It should be noted however that though the case's reference to section 1 (1) of the Law of Evidence Amendment Act, addressed only foreign law and not indigenous law, the point still applies to customary law.

provision applies to customary law. In *Hlophe v Mahlalela & Anor*⁷⁷ the court could not ascertain the Swazi law and custom pertaining to custody of minor children after the death of the mother whose lobola was yet to be fully paid even after checking five books.

The courts may augment scarce authorities with facts presented in evidence. In *Mabena v Letsoalo*⁷⁸ also decided in the same year, the court lamented a dearth of authorities on the customary rule put before it that the plaintiff and the mother of the bride can negotiate lobola. It, however, relied on facts put before it under section 1 (2) of the Law of Evidence Amendment Act which confirmed the few documents presented to it.

Relying on judicial notice dispenses with the need to lead evidence to prove customary law.⁷⁹ This is because the courts would regard the customary law as an established fact.⁸⁰ However, relying on such recorded law will foreclose the ascertainment and application of living customary law by courts. This thesis argues that an approach that is more amenable to living customary law would be for courts to utilise credible evidence of a customary law to buttress what the court has judicially noticed, or to disprove the credibility of what may have been judicially noticed.

According to Zeffertt *et al*, the practice of judicial notice in South Africa lacks a clear-cut distinction between 'a judicially noticed fact (which at common law has the effect of being conclusively proved) and a fact that has been rebuttably presumed (that is which has been sufficiently proved)'.⁸¹ The situation is similar for Nigeria. This thesis argues that different evidentiary value should attach to each. Where parties to a suit do not dispute the contents of the applicable customary law for which they must lead credible evidence to show that it does not represent the norms of the community, there should be a rebuttable presumption that that customary law is definitive on the matter. This is because no evidence was lead to conclusively prove the norm. Parties in subsequent cases should be given the opportunity to rebut the norm by presenting contrary evidence.

⁷⁷1998 (1) SA 449 T.

⁷⁸1998 (2) SA 1068 (T).

⁷⁹O'Dowd op cit note 50 at 103.

⁸⁰Zeffertt *et al* note 20 715.

⁸¹Ibid at 716.

It should however be noted that where a customary norm has been conclusively proved, it is different from admitted facts which need not be proved under the evidence act. In a situation where parties in a subsequent case are not in dispute with a customary norm that had been conclusively proved in an earlier judgement, the judgement in the subsequent case affirming the conclusively proved customary norm should not be treated as a situation of admitted facts. The implication for such admitted facts is that they are not binding on subsequent cases on similar subject matter involving other parties who dispute their veracity and therefore should not qualify as judicially noticed facts.

The rule of *stare decisis* creates occasions where lower courts are compelled to apply wrongly ascertained customary law.⁸² The common law position on judicial notice is that if judicial notice is taken of a fact as an outcome of an inquiry, no issues will be raised again concerning the fact.⁸³ However, it is a difficult proposition to apply *stare decisis* to customary law. Where judicial notice is utilised to preclude the presentation of further evidence to disprove a customary law that has been judicially noticed, it may hinder the ascertainment and application of living customary law by the courts especially giving its flexible nature and contextual application. Judicial notice may have its advantages, offering a less cumbersome means of proof, but it need not be sacrosanct when it comes to customary law. A rigid application results in a less credible process for ascertaining living customary law by the courts.

Therefore, where a party has reason to dispute the content of a customary law that has been judicially noticed, he should be given the chance to present evidence to the contrary. The provision of section 1 (2) of the Law of Evidence Amendment Act already addresses this by stating that 'the provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.' The disjunctive word 'or' used in section 1 (a) of the Evidence Act notwithstanding, also covers this if the party who puts forth the evidence contends that judicial notice cannot be applied for reasons that it does not correspond with the customary norms of the particular community.

⁸² Kludze a K P 'Evolution of the different regimes of customary law in Ghana within the framework of the principle of *stare decisis* in Allott A & Woodman G R (eds) in *People's Law and State Law The Bellagio Papers* (1985) 99.

⁸³ Zeffert *et al* note 20 at 717.

The entire process of ascertainment encompasses a convergence of statutory and customary laws and the two ways it can be done as prescribed by statute engages with ideologies of positivism and pluralism.

3.5 Conclusion

The challenges that affect the ascertainment and application of customary law by the courts began in the way and manner customary law was recognised, regulated and adjudicated in colonial times. Currently, this is regulated by the respective laws of evidence, civil procedure rules and court laws in both countries. The Law of Evidence Amendment Act in South Africa and the Evidence Act in Nigeria provide for the utilization of judicial notice as a means of proving customary law but this must not be done at the expense of ascertaining and applying living customary law since the utilization of judicial notice may impede this in certain circumstances.

The inclusion of the chiefs and headmen's court in the application of judicial notice, i.e. to be used as a source, can provide rich jurisprudence and source of living norms applicable in the respective communities beneficial to other formal courts. The broad provision on the application of judicial notice under Nigerian law leaves a lot to be desired as it leaves wide room for the exercise of discretion which can impede the ascertainment and application of living customary law. The law in South Africa is more concise but the provisions of section 5 (1) of the Civil Proceedings Evidence Act and section 1 (1) of the Law of Evidence Amendment Act also create a challenge with respect to judicial notice of legislated customary law over living customary law.

This thesis argues that an approach that is more amenable to living customary law would be for courts to utilise credible evidence of a customary rule to confirm what the court has judicially noticed, or to disprove the credibility of what may have been judicially noticed. It also argues that there should be a clear cut distinction between judicially noticed facts that are sufficiently proved and those reputably presumed. While for the latter, credible evidence can be led by the parties on the applicable living customary law to rebut the presumption, such credible evidence should also not be foreclosed for the former where necessary.

Judicial notice is but one approach through which the courts can ascertain customary law. The other approach which is by proof as facts through evidence is extensively discussed in chapter four.

Chapter Four

The Process of Ascertainment of customary law by formal courts –

Proof as facts by Evidence

4.1 Introduction

The process of ascertaining and applying customary law in court is part of the procedures of the court in the adjudication of cases and this process utilises two approaches. While the previous chapter dealt with ascertainment of customary law through judicial notice, this chapter explores the ascertainment of customary law by proof as facts through evidence based on data, primary and secondary sources utilised in the research. The chapter discusses how this is done in courts that are primarily for the adjudication of customary law and other regular courts that also hear customary law cases. When ascertaining customary law through this approach, judges utilise one or more of the methods of ascertainment that are discussed below in 4.3.2.1.1. The chapter also discusses the challenges associated with utilising these methods and how they impede the ascertainment and application of living customary law. It is vital to note here that when courts utilise these methods, there is a wide scope available for the exercise of discretion in the process of ascertaining and applying customary law.

4.2 Proof of customary law as fact through evidence - Nigeria

Apart from judicial notice, another approach in which the existence and practice of customary law can be ascertained by the court under the Evidence Act is through proof as a fact. Indeed section 18(1) of the Evidence Act provides that a custom that cannot be judicially noticed must 'be proved as a fact.' This is usually done by the party alleging it. Customary law is law, but it is treated as fact for the purpose of its ascertainment. Nigerian courts, 'have long maintained that [i]t is as a well-established principle of law that native law and custom is a matter of evidence to

be decided on the facts presented before the court in each particular case...'¹ Statutes, such as the Evidence Act, also provide that evidence of a custom's content must be proved before the court and in this instance, it is treated as fact. Proof of customary law is done in both customary courts and non-customary courts.

4.2.1 Proof of customary law in customary courts

Generally, customary courts are excluded from the application of the Evidence Act and this may be for the reason that customary law procedures should apply to its proceedings.² Though the FCT Customary Court Rules, 2007 does not specifically require proof of the customary law where the court is situated, customary courts' judges have required proof. Perhaps this omission is based on the assumption that the judges are versed in the customary law within the location of the court but this is not so since the judges are hardly indigenous to the communities where their courts are located. Even if they were, consideration must be given to variations and nuances that are distinct to clans and families within the community. The heterogeneity of cultural systems now prevalent in urban and rural settings in Nigeria makes it impossible for any single judge or panel of judges to be knowledgeable in all the customary law systems within the court's jurisdiction. This therefore makes proof of customary law a necessity. Currently, a number of customary courts in Abuja are presided by judges who are from different communities outside the location of the courts and are qualified legal practitioners who have been trained in the principles of evidence.

Obilade's view that customary courts must be governed by customary law in the absence of statutory provisions requiring the proof of customary law in customary courts is not applicable in Nigeria's Federal Capital Territory (FCT). Statutory provisions now require the proof of customary law in the customary courts and the Customary Court of Appeal Abuja. The

¹*Giwa v Erinmilkun* (1961) 1 All NLR 294. Here, the Federal Supreme Court confirmed the decision of the lower court which took judicial notice of the content of the customary law of Lagos that absolute grant of land even to war chiefs was not practiced. See also Asein J O *Introduction to Nigerian Legal System* (2005) 120.

²Obilade A O *The Nigerian Legal System* (1979) 99.

Customary Court Act 2007 permits the application of certain provisions of the Evidence Act.³ The Customary Court (Civil Procedure) Rules 2007 requires parties to prove their case before the court where no liability is admitted.⁴ This invariably covers proving the content of customary law being put forward before the court.

There are more specific provisions that require proof of customary law before the court. According to section 19 of the FCT Customary Court Act, 'Evidence of a customary law shall be adduced in a customary court in all such cases as may be provided in the rules made under this Act'. Order 12 rule 7 of the Customary Court (Civil Procedure) Rules 2007 specifically requires proof where the alleged customary law applies in an area outside the jurisdiction of the court. However, in line with Obilade's view, the evidence, and the means by which it is given and recorded by a court must accord with the native law and custom applicable to the matter at hand.

Customary courts are required to ascertain customary law in accordance with the applicable native law and custom in the case before the court.⁵ Invariably, the court may only receive evidence from those customarily authorized to state what the content of the customary law of the community is of necessity, the judge must first determine how this must be done under the applicable customary law. In essence, when exercising discretion, the judge must place more reliance on the evidence of those authorized by customary law over other sources he may consider to be more credible and authoritative. He/she cannot rely on other methods outside the traditional practice to ascertain the customary law to be applied in the case.

In the cases analysed in the customary courts and the FCT Customary Court of Appeal, the records of proceedings do not reveal that any ascertainment of the method of proving customary law under the applicable custom was done. The court simply embarked on the determination of the content of the applicable customary law to apply in the case before it. No

³Section 65 provides that 'The Customary Court and Customary Court of Appeal FCT Abuja shall in judicial proceedings be bound by the provisions of sections 14, 15, 59, 76, 77, 78, 92, 93, 135, 136, 155, 177 and 227 of the Evidence Act.'

⁴ Order 10 Rule 5 and Order 10 Rule 7 (1) & (2) (b). Akrofi asserts that the courts are known to dispense with the need for proof of a customary law where a member of the court is knowledgeable in the customary law of its jurisdiction and he refers to *Ehigie v Ehigie* (1964) 1 All NLR 842. See Akrofi A 'Judicial recognition and adoption of customary law in Nigeria' (1989) 37.3 AJCL 575.

⁵ Order 12 Rule 5.

ground of appeal in the cases analysed in the appellate court relates to the failure of the court a quo to first ascertain the method of ascertainment under customary law. Perhaps how customary law was ascertained in the court a quo was in line with what is required under the applicable customary laws.

Order 12 rule 7 requires the ascertainment of customary law for only cases that require the application of customary law of communities located outside the jurisdiction of the court. The cases analysed in the customary courts however revealed that the courts adopted similar procedure of ascertainment for cases involving the application of customary law of communities located within and outside the jurisdiction of the court regardless of the lacuna in the rules of court.

Where a party is dissatisfied with the decision of the customary court with respect to what was ascertained as the applicable customary law, on appeal, he may apply to the Customary Court of Appeal for 'leave to adduce evidence' of the customary law.⁶ Presentation of evidence at the court may be at the instance of the parties or the court. Where a party with the leave of court presents evidence before the Customary Court of Appeal, the opponents would also be given the opportunity to do likewise.⁷ The court may also order parties to provide additional evidence as it deems necessary or direct the court below to take fresh evidence and 'report specific findings of fact' back to it.⁸ The court below is also expected to 'express its opinion on the demeanour of the witnesses and of the value of their evidence and may also, if it is the same court against whose decision the appeal has been made, state whether or not it would have come to a different decision had the additional evidence been brought forward at the trial.'⁹

The Customary Court of Appeal basically has appellate functions. However, by virtue of the Customary Court of Appeal of the FCT Abuja (Jurisdiction of Chieftaincy Matters) Act, 2011,¹⁰ it now has original jurisdiction to exclusively 'hear and determine dispute on or relating

⁶ Order 12 rule 8.

⁷ Order 12 rule 9.

⁸ Order 7 rule 15.

⁹ Order 7 rule 16 (4).

¹⁰ No. 52 of 2011

to Chieftaincy matters'.¹¹ There is a wide range of discretion exercised by the judges who themselves are qualified legal practitioners in ascertaining and applying living customary law and this is determined by a number of factors discussed in the subsequent chapters.

4.3 Proof of customary law as fact through evidence – South Africa

Just as the situation with judicial notice, the Law of Evidence Amendment Act provides that customary law can be ascertained in court by proving it as facts through evidence brought before the court. How this is done in the courts of chiefs and headmen depends on the procedure adopted by the particular chief.

4.3.1 Proof of customary law in courts of chiefs and headmen

The procedure followed in the courts of chiefs and headmen was prescribed in the repealed Black Administration Act.¹² Currently, this is regulated by the Chiefs' and Headmen's Civil Court Rules.¹³ Rule 1 provides that in civil cases, the procedures adopted by the court will be regulated by 'the recognized customs and laws of the tribe'. Therefore, the procedure utilised by the court to resolve disputes is the procedure applicable under the particular customary law. This procedure is broadly accepted as being 'simple, informal and flexible'.¹⁴ Dlamini asserts that the procedure applicable in the courts of chiefs and headmen is inquisitorial¹⁵ and therefore the chief/headman and his counsellors would play an active role where there is a need to ascertain the content of customary law.

Ascertainment is necessary where the chief is uncertain about specific contents and would consult with his counsellors. Sometimes, the customary law of a different community not known to the particular court would need to be ascertained. The chiefs and headmen's courts are not bound by certain restrictions such as the parties' prayers and the rules of pleadings but

¹¹Section 1 (b).

¹²28 of 1927. This is by virtue of rule 12 of the BAA. Currently, only three sections of the BAA survived and these are sections 12 (1, 2, 3, 4 & 6), 20 (1, 2, 3, 4, 5, 6 & 9 and the 3rd Schedule. These, will continue in force until a national legislation is passed as a replacement.

¹³GN R2028 of 29 Dec 1967. This rules were however repealed in Kwa Zulu Natal in 1989.

¹⁴Project 90 Customary Law Report on Traditional Courts and the Judicial Function of Traditional Leaders p 18.

¹⁵Dlamini C R M 'The Role of Chiefs in the Administration of Justice in Kwazulu' A thesis submitted in partial fulfillment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria 1988 187, 190 – 191.

are at liberty to rule in ways that they consider would bring justice to the case.¹⁶ Therefore, in the exercise of discretion with respect to ascertaining and applying customary law in cases before them, they would paddle through some degree of likely solutions which in any way is line with the flexible nature of customary law. At the centre of their consideration is the desire to achieve justice and reconciliation albeit subject to customary norms.¹⁷ The procedure adopted for the ascertainment and application of customary law where necessary is determined by the particular court and not the provisions of the law of Evidence Amendment Act.

4.3.2 Proof of customary law as fact through evidence in regular courts other than courts with mainly customary law jurisdiction in Nigeria and South Africa

Proof as facts through evidence in Nigeria and South Africa is discussed together because the processes are largely similar for regular courts in both countries. Here, the outcome of the various methods of ascertainment are utilised. The analysis of these methods is done generally. It should however be noted that some of the methods discussed here are also adopted under judicial notice.

Section 16 (1) of the Nigerian Evidence Act provides that ‘A custom may be adopted as part of the law governing a particular set of admissible circumstances if it ... can be proved to exist by evidence.’ Subsection (2) of section 1 of the South African Law of Evidence Amendment Act provides that even though customary law may be ascertained through judicial notice, it ‘shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned’. How then is evidence led to prove the substance of the applicable legal rule?

The case of *Angu v Attah*¹⁸ holds that customary law is proved –

In the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the

¹⁶Ibid at 192 – 193. Order 13 rule 1. It should be noted however that this does not extend to monetary orders in civil claims.

¹⁷Dlamini op cit note 15 at 190.

¹⁸Supra.

courts, become so notorious that the courts will take judicial notice of them.

The danger Bennett identified in the approach of regarding customary law as facts, relates to the point that once customary law is regarded as fact, then it resultantly must be pleaded in every case with fresh evidence presented to prove its existence since facts are 'peculiar to the particular case and, in principle, judicial notice cannot be taken of them'.¹⁹ This thesis' position however is that with regard to determining the content of the applicable customary norm, where it is proved conclusively as fact, it need not be pleaded in every case with fresh evidence unless it can be established that the normative practice has evolved. This position is however subject to the criticisms and limitations of customary norms passed through an institutional process and reduced in written form even though proved as facts as discussed under 4.3.2.1 below. The facts of a dispute are peculiar to each dispute but this is not necessarily so for facts of a normative practice.

It is important to note here that Zeffertt *et al* aver that the judge's personal knowledge of facts cannot on their own qualify as facts that can be 'ascertained readily and with sufficient certainty'.²⁰ While agreeing with Zeffertt *et al*, this thesis asserts that a judge's knowledge may play a role in the process of ascertainment he adopts. This is because he may be sceptical about readily accepting the notoriety of a set of facts as sufficient proof based on his earlier knowledge so he may indulge the presentations of further evidence and may also use assessors to confirm the facts.²¹

As already intimated, the methods of ascertainment utilised in the process of ascertainment in Nigeria and South Africa are similar and will therefore be discussed hereunder.

¹⁹ Ibid.

²⁰ Zeffertt D T, Paizes A P & Skeen A St Q *The South African Law of Evidence* (2003) 717.

²¹ Although the case of *van Breda v Jacobs* 1921 AD 334 (Though not on African customary law) states that judicial notice can be taken of a custom which is old and has been in long usage. This definition in application to African customary law will not suffice based on its flexible and evolving nature.

4.3.2.1 *Methods of ascertainment*

When a customary law dispute comes before a court, the party who alleges that a particular practice is the applicable customary law would ask the court to take judicial notice of the practice as having been proven, or may seek to proffer evidence of facts to prove the existence of the customary law. Where customary law has to be proved as a fact before Nigerian and South African courts, any or a mixture of various methods of ascertainment is utilised.²² These methods include the recounting of lived experiences by witnesses,²³ the opinion of experts regarding particular customary laws, texts, manuals, customary courts case book analysis, assessors, the opinion of native chiefs, academic records obtained through questionnaires, commissions of inquiry, legislation, judicial precedents, codification, and restatement. Yet another method, which was recently developed, is self-statement. A party who alleges a customary law may employ any of these methods. These methods are discussed below. This section concisely explains what they are and criticisms related to the challenges of utilising them. This is done on the basis of the weight they carry with respect to how they apply to the process of ascertainment in answering the overarching question of this thesis which is ‘What factors determine the ascertainment and application of customary law by the courts?’ It should be noted that precedent is excluded here because it had been discussed in chapter three.

4.3.2.1.1 *Ascertainment through assessors*

Courts in Nigeria and South Africa used assessors to ascertain customary law. While this still subsists in South Africa, assessors are no longer used in Nigeria. Such assessors are usually Africans who are versed or presumed to be conversant in the particular customary law sought to be ascertained. The assessors are either chiefs, traditional leaders or persons who by virtue of their position had first-hand experience or were versed in customary law. They were

²² Bennett T W & Runger M (eds). *The Ascertainment of customary Law and the Methodological Aspects of research into customary Law*: Proceedings of Workshop, February/March 1995 Windhoek: Law Reform & Development Commission.

²³That is witnesses sharing from their personal experiences and knowledge.

appointed to sit with and assist the judge(s) in resolving disputes based on their knowledge of the applicable customary law. In colonial times, they were selected by the colonial officers.²⁴

In South Africa, assessors were either 'subpoenaed or summoned' to court to provide assistance.²⁵ In Nigeria, customary courts used assessors²⁶ and selected them from an approved list of assessors²⁷ as is currently done in South Africa. Their role was solely advisory. However they were known to alter their positions a number of times in the course of a case,²⁸ which put their reliability in question. The practice in both countries then was that they had no vote in the final decision of the court even though their opinions were habitually accepted,²⁹ though hardly ever chosen over precedents.³⁰

In the past, the role of assessors was akin to that of an expert witness,³¹ though distinguishable in the sense that it is the court – rather than the parties– that summoned them to render expert evidence. Their assertions were not subject to cross examination. Also, their opinions were sometimes given in private when sought by the presiding magistrate. Bennett and Park have criticised this. Writing about the practice in South Africa, Bennett argued that it undermines the value of expert testimony when it is not subjected to rigours of cross-examination. Park recommended that expert opinion by court-summoned assessors be subject to cross examination.³²

Currently in South Africa, assessors sit with the judge but their views are still not subject to cross examination and are given in the judge's chambers. Park's recommendation is therefore pertinent in order to test the credibility of the assessor's testimony and to give the other party a chance to respond to their testimonies. This will better aid the court to have a

²⁴ Ibhawoh B 'Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa' (2009) 4.3 JGH 5.

²⁵ Bennett T W *Application of Customary law in Southern Africa* (1985) 18 & 28. This was supported by section 19 (1) of the BAA.

²⁶ Keay E A & Richardson S the *Native and customary Courts of Nigeria* (1966) 208.

²⁷ Ibid.

²⁸ Ibid at 209. Reference was made to the cases of *Sarkin Pawa v Akangbi Sarkin Sango* (1961) WNLR 268 and *Sobolajiboso v Obadina* (1962) WNLR.

²⁹ Park A E W *The Sources of Nigerian Law* (1963) 89. See also Keay op cit note 26. See the case of *Sogbola Are v Ibiluade* (1962) WNLR referred to.

³⁰ Bennett op cit note 25 at 28.

³¹ Ibid.

³² Park op cit note 29 at 89-90.

level ground in exercising discretion to go for the more cogent and credible version of customary law. Although assessors may present a picture of neutrality because they are summoned by the court, they are not immune from deliberate or inadvertent error either as a result of bias due to direct or indirect interest in the subject matter of the dispute, or because their genuinely held opinion are distorted or outdated versions of customary law. The process of selecting assessors may also be flawed, where for instance the selection criteria fails to produce the most knowledgeable persons with regard to the applicable customary law. In South Africa, it is done by the office of the Premier.³³

Currently courts in Nigeria where necessary, summon experts or persons versed in the particular customary law to testify in court on the content of the applicable customary law and their testimony is subject to cross examination by the parties. These persons/experts are recommended by the chief of the community who is requested by the court to recommend someone well versed in the content of the customary law sought to be ascertained and applied. This method seems more cogent for the ascertainment of living customary law than the views of assessors which cannot be challenged by the parties.

4.3.2.1.2 *Ascertainment through witnesses*

According to the Black's Law Dictionary³⁴ a "witness" is a person who testifies in a cause before a court. In its broader meaning, it includes all persons from whom testimony is extracted for a judicial proceeding on issues that are within their knowledge. The recounting of lived experiences by witnesses (whether orally and (or) in writing) as a method of ascertaining customary law is clearly covered by the Evidence Act of Nigeria and the Law of Evidence Amendment Act South Africa.

According to section 18 (2) of the Nigerian Evidence Act –

Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons who would be likely to know of its existence in accordance with section 73.

³³See the case of *Modiakgtla v Noko & Anor* (2014) Unreported North West High Court Mahikeng MG CIVLI APP 13/12. See also Bophuthatswana Traditional Courts Act No. 29 of 1979 & Proclamation No. 110 of June, 1994.

³⁴Seventh edition.

Section 73 (1) provides that the court may admit the opinions of persons who are likely to know of the existence of a general custom or right in order (for the court) to form an opinion about the existence of the said custom or right. These provisions do not restrict such opinions to expert witnesses. Similarly, section 1(2) of South Africa's Law of Evidence Amendment Act permits the presentation of evidence to prove the 'substance of a legal rule'. The provision recognizes that a person who is not an expert, may testify about the content of a custom if he or she is 'likely to know of its existence'.

Litigants have utilised these provisions to bring witnesses who are ordinary members of the community – rather than experts– to present testimonies with respect to their lived experiences of customary law or what was related to them through legitimate customary means such as oral history from their fathers.³⁵ The challenge with this method of ascertainment however is tied to the credibility of the witnesses and how the judges may interpret their narration of the customary rules they relate. For example, and as observed by Burman, in an era of urbanization in which people migrate from their rural roots where adherence to traditional values are strong, in preference for urban areas and cosmopolitan lifestyles, their views or testimonies regarding customary law may be misleading to a court in some cases.³⁶

An obvious misnomer, for instance, would be where the court approaches the ascertainment of customary law using a legalistic approach to problem solving, as opposed to the customary law preference for a commonsensical approach.³⁷ A good instance is the scenario related by von Benda-Beckman's testimonies of witnesses related to the litigant which he states are usually treated with suspicion and sometimes are rejected by judges on that basis whereas in customary law parlance, it 'is considered normal and desirable' to have relatives testify on behalf of litigants.³⁸

³⁵Based on the cases analysed.

³⁶ Burman S 'Researching the Living law in urban South Africa' in Bennett T W & Runger M (eds) op cit note 22 at 71.

³⁷ Beckman k V B 'The use of folk law in West Sumatran state courts' in Allott A N & Woodman G R (eds) in *People's Law and State Law The Bellagio Papers* (1985) 83 - 84. See also Allott A N, Epstein A L & Gluckman M 'Procedures: proceedings and evidence in African customary law' in Gluckman M (ed) (1969) 22. According to these authors, what, in a few sentences (here) constitutes a legalist approach and commonsensical approach?

³⁸Ibid.

Both Nigeria and South Africa regard witnesses' testimonies as relevant to ascertainment. In Nigeria, the courts would deem as relevant any fact which 'tends to show how in particular instances a matter alleged to be a custom was understood and acted upon by persons then interested'.³⁹ Similarly, section 2 of South Africa's Civil Proceedings Evidence Act deems as admissible any relevant and material evidence of 'fact, matter or thing' which may 'prove or disprove any point or fact in issue...' Where such witnesses are credible, their accounts of the customary norms aid the court in its exercise of discretion towards the ascertainment of living customary law.

4.3.2.1.3 *Texts & other written materials*

These refer to books, manuals, handbooks, Commission Reports, and other informal sources, such as journals of missionaries and travellers to the particular African communities.⁴⁰ These informal sources are sometimes mere records of the untested impressions of their authors and devoid of anthropological standards.⁴¹ Although these have been utilised in earlier and recent times to ascertain customary law,⁴² they may not be credible sources for the reasons given above.

Courts would prefer that such written materials presented to them as proof of customary practices are affirmed by the communities to which they apply as held in the West African Court of Appeal which overturned the decision of the lower court in the case of *Adedibu v. Adewoyin*.⁴³ In this particular case, the court a quo ignored the contradictory evidence of the parties on the content of customary law made to the family head and relied instead on the version in a text⁴⁴ which was different from the averments of the parties. This text did not form part of the evidence of the parties and none of the counsel referred to it. The appellate court held that where the court relied on a text, it must have been part of the evidence put before the court, and it must also be proved that either the book or its manuscript has been accepted by the community as a 'legal authority'.

³⁹Section 19 Evidence Act 2011.

⁴⁰Bennett op cit note 25 at 25.

⁴¹Ibid.

⁴²Ibid.

⁴³[1951] 13 W.A.C.A. 191.

⁴⁴Ward-Price H L *Memorandum of Land Tenure in the Yoruba Provinces* Lagos 1933.

A South African example is Maclean's Compendium of 1856⁴⁵ which magistrates used as a guide on the content of customary law before the Report of the Native Law and Customs Commission 1883.⁴⁶ Prinsloo however criticized the report as offering a version of customary law that was collated by 'officers and missionaries who had not made a proper study of the relevant customary law'.⁴⁷ In Nigeria, an attempt to collate customary law is being undertaken by the Law Reform Commission of Abia State.⁴⁸

Considerable research efforts have been put into this exercise, but it is not likely that the objective of publishing a manual of all the customary laws of the communities in the State will be completed in the near future.⁴⁹ For the exercise to be a credible documentation of the customary norms, it must meet the necessary sociological and anthropological standards for such exercise.

In South Africa, Seymour's Native Law and Custom, published in 1911, was regarded as a major reference material by courts, even though it was initially restricted to the Cape and Transkei.⁵⁰ Later editions of the text incorporated research data that were gathered through anthropological research, court precedents and commission reports.⁵¹ However, Bennett criticized the text for representing customary law through a Eurocentric view.⁵² Later customary law texts include the South African Native Law by Whitefield,⁵³ Schapera's book on Tswana

⁴⁵ It was compiled and edited by Col Maclean who was a chief Commissioner of British Kaffraria. See Stanford W E M *The reminiscences of Sir Walter Stanford Macquarrie J W* (ed) (1958) 35.

⁴⁶ Bennett op cit note 25. See also Erklank N 'Gendering commonality: African men and the 1883 Commission on native law and custom' (2003) JSAS 29.4 937 - 953.

⁴⁷ Prinsloo M W 'Selected projects of the codification and restatement of customary law in Southern Africa' in Bennett & Runger op cit note 22 at 38.

⁴⁸ 'Achievements of the Abia State Law Reform Commission 1999 - 2010' available at <http://abialawreformcommission.org/questionnaires.htm> (Accessed on 25/06/2015).

⁴⁹ Ibid.

⁵⁰ Bennett op cit note 25 at 26.

⁵¹ Ibid.

⁵² Ibid. Bennett also mentioned other reasons why these texts were rejected which is that they were 'tainted by their association with colonialism and apartheid' See Bennett T W 'Re-Introducing African Customary Law to the South African Legal System' (2009) AJCL Vol. 57, No. 1 p 3.

⁵³ Whitefield G M B *South African Native Law* (1946).

Law⁵⁴ – essentially a restatement of customary law. There have been a number of other texts in more recent times.⁵⁵

Examples of Nigerian texts include Elias' numerous texts, such as Nigerian Land Law and Custom amongst others,⁵⁶ and Bohannan's text on the Tivs in Nigeria.⁵⁷ 'The Traditional Concept of Justice among the Ibo of South-Eastern Nigeria'⁵⁸ is another text, and some others.⁵⁹ Another resource is a book titled 'Towards a Restatement of Nigerian Customary Law' published by Nigeria's Federal Ministry of Justice. There are also manuals on customary laws such as '[t]he customary law manual: a manual of customary laws obtained in the Anambra and Imo States of Nigeria',⁶⁰ and other more current ones.⁶¹ The main challenge here is that there is a dearth of texts especially recent ones to aid the court as lamented by Woodman.⁶² Apart from the fact that texts may not have credibly captured the customary laws of communities, these customary laws where properly captured may have evolved and would therefore not aid the court in exercising discretion towards ascertaining and applying living customary law.

Commission reports are products of commissions of inquiry which, by virtue of their respective terms of reference, purportedly ascertained the contents of customary law at their hearings.⁶³ In South Africa, there have been the Natal Native Commission of 1852, the Cape

⁵⁴Schapera I *A Handbook on Tswana Law* first published 1st Ed (1938) 2nd ed (1955). See also A J Kerr's texts on customary law and Simons H J *African women: their legal status in South Africa* (1968).

⁵⁵Such as Bekker J C *Seymour's Customary Law in Southern Africa* 5th ed (1989). Bennett T W *Customary Law in South Africa* (2004).

⁵⁶See the following: Elias T O *Groundwork of Nigerian Law* London, (1954); Elias T O *British Colonial Law A Comparative study of the Interaction Between English and Local Laws in British Dependencies* (1962); Elias T O *Law and Social Change in Nigeria* (1972); Elias T O *Law in a Developing Society* (1973); Elias T O *The Nature of African Customary Law* (1956); Elias T O *The Impact of English Law on Nigerian Customary Law* (1958); Elias T O *Nigerian Land Law and Custom* (1951).

⁵⁷Bohannan P *Justice and Judgement among the Tiv* (1957).

⁵⁸Otonti Nduka *The Traditional Concept of Justice among the Ibo of South-Eastern Nigeria* (1977) OJYRS 15 91-103.

⁵⁹Isichei E *The Igbo worlds* (1977). Leith-Ross S *African Women: A Study of the Ibo of Nigeria* (1965). Lloyd P C *Yoruba Land Law* (1962). Armstrong G R 'The Idoma-Speaking Peoples' in Forde D et al (eds.), *Peoples of the Niger-Benue Confluence, Ethnographical Survey of Africa, West Africa Part x*, London: Institute of African Studies, (1951).

⁶⁰Obi 'S N C *The Customary Law Manual: a Manual of Customary laws Obtaining in the Anambra and Imo States of Nigeria* (1977).

⁶¹Udenwoke A *Basic Igbo Customary Laws: A Guide to Customary Law Practitioners* 2nd ed (2010) and Egu A B C, et al (eds) *Imo State Customary Laws and Judicial Pronouncements* (2011).

⁶²Woodman, G R *African customary law in South Africa: Post-Apartheid and living law perspectives*, Himonga C, Nhlapo T, Maithufi I P, Mnisi-Weeks S, Mofokeng L & Ndima D : book review (2015) *South African Law Journal* 689-693.

⁶³See for instance South African Native Affairs Commission of 1903-1905 Report p. 2.

Native Laws and Customs Commission of 1883, the South African Native Affairs Commission of 1903-1905 and the South African Law Reform Commission Reports.⁶⁴ The contents of these reports were prominently used by courts to ascertain customary law.⁶⁵ As helpful as these methods may seem to be to the courts, some have been criticized for not utilizing scientific methods in the observations recorded, and for being clouded by the Eurocentric views of the authors.⁶⁶ Those that were compiled by lawyers have been criticized as being rule based and failing to present the normative realities of the customary laws they claimed to present⁶⁷. The more recent are the Project 90 Customary Law Report on Traditional Courts and the Judicial Function of Traditional Leaders on customary law and practices which have been utilised in the process of ascertainment and application of customary law in the courts in recent times.⁶⁸ These have been more useful when development of the customary norm is contemplated which presents the current view of what the community wants. This is because if the customary laws are credibly sourced, they present before the courts the tools with which to aid them in exercising discretion towards the ascertainment and application of living customary law.

Colonel CB Maclean's compendium of the customary laws of British Kaffraria is an example of a source of customary law. However, these sources may be described as indicative of the contextual framework of what Kerr refers to as customary law and may be distinct from living customary law. Indeed, Kerr did acknowledge that the records are older than what the natives would state as their customary law at the time of his writing.⁶⁹ According to Kerr, the records were partly statements of eminent tribesmen and of 'settlers, colonial administrators and missionaries, who came into contact with local tribesmen, and were able to observe how the laws were administered by the chiefs'.⁷⁰ Some of these statements were given as witness testimonies in court. In one particular case, the court relied on evidence provided by the Hon.

⁶⁴Established by the South African Law Reform Commission Act 19 of 1973

⁶⁵ Bennett op cit note 42 at 25.

⁶⁶Woodman G Book Review 'Eugene Cotran, Case Book on Kenyan Customary Law' (1992) available at <http://commission-on-legal-pluralism.com/volumes/32/woodmanoncotran-rev.pdf> (accessed on 07/06/2017) 151.

⁶⁷Ibid 152.

⁶⁸See cases such as *Bhe v Khayelitsha* supra.

⁶⁹Kerr A 'The nature and future of customary law' (2009) available at http://reference.sabinet.co.za/webx/access/electronic_journals/ju_salj/ju_salj_v126_n4_a4.pdf (accessed on 30/05/2017) 1-13.

⁷⁰Ibid.

Charles Brownlee, whose testimonies regarding customary law was held in high esteem and relied upon by courts. Courts have also relied on the findings of native law commissions, such as the 1883 Commission.⁷¹

In *Matyesi v Dulo*,⁷² it was noted that courts have arrived at many decisions with the aid of the evidence on the native law and custom of the indigenous Africans in the Cape Colony. These were presented before native commissions, and such evidence were complemented by the 'valuable assistance of Assessors'.⁷³ In Kerr's view, these sources should not be fleetingly dismissed because the processes adopted by the commissions and assessors to adduce evidence of customary law were thorough and conscientious.⁷⁴ Nevertheless, however thorough and conscientious those processes may have been, it must be pointed out that there are issues that question the credibility of these sources of customary law with respect to, for instance, the protection of colonial interest discussed in the previous chapter. Besides, the authenticity of these records may be challenged on certain grounds such as the Eurocentric conceptions of their authors.

4.3.2.1.4 *Ascertaining through restatement*

Where the courts exercise discretion in adopting restated customary law, whether or not living customary law is ascertained and applied depends on the authenticity of the restatement. Two of the main purposes of restatement are to promote certainty regarding the content of customary law and to limit judicial discretion in its ascertainment.⁷⁵ Prinsloo describes restatement as entailing 'an authoritative and systematic recording of customary law or a

⁷¹Ibid.

⁷²(1915) 3NAC 102 at 103.

⁷³Kerr op cit note 69 at 678. *Nbono v Manoxoweni* (1891) 6 EDC 80. ff: *Bidli v Mills* (1905) 19 EDC 93 at 98: *Ugijima v Mapumana* (1911) NHC 3at 5: *Pto v Costa* (1931) NAC (C&O) 38 at 40: *Mokhantso & Anor v Chocane* (1947) NAC(C&O) 15 at 16. See footnote 3 & 4 Kerr note 86 at 14. The recent cases analysed in these cases for Nigeria and South Africa confirm that these sources are still utilised even though latest judgements indicate a quest for current normative practices of the community.

⁷⁴Kerr op cit note 69.

⁷⁵Ubink J 'Stating the Customary: An Innovative approach to the locally legitimate recording of customary law in Namibia' *Traditional Justice: Practitioners' Perspectives* (2011) WPSIDO 4 & 5.

branch thereof for juridical purposes'.⁷⁶ While restatement achieves a semi-codification of customary law, it may not be compared to codification which results in legislated law.

Restated customary laws merely serve as guide for courts and other practitioners and do not override court decisions.⁷⁷ This may diminish the weight that courts attach to restatements. Nonetheless, they should provide courts some reasonable assistance because they are presented as legal rules in a form that courts are familiar with.⁷⁸

Hence, restatements have been utilised by courts during ascertainment in order to address the unreliability of witnesses' testimonies and deficiencies in information in texts especially where judges find such accounts to be 'unsatisfactory'.⁷⁹ Restatements are essentially done by researchers rather than by courts. The outcomes of such research are presented to courts as restatements of customary law. Since courts utilise restatements when exercising discretion, it is vital to discuss its reliability as a method of ascertainment and briefly recount how it has been done on the continent.

In Africa, Allott prosecuted an ambitious project of restatement in which Eugene Cotran and Hans Cory, an anthropologist, were involved at different stages, in order to provide a 'strong *prima facie* evidence of customary law on a given topic'.⁸⁰ The project was meant to cover 16 English speaking African countries, including Nigeria.⁸¹ In the end, the project produced only six volumes of restatements of the customary laws regarding marriage and divorce, succession and family law in just a few countries.⁸²

⁷⁶ Prinsloo op cit note 47 at 36.

⁷⁷ Allott A N 'International development in customary law: The restatement of African Law project and thereafter' in TW Bennett & M Runger (eds) op cit note 22 at 31.

⁷⁸ Allott A N 'Law and Social Anthropology' (1967) 17 Sociologus in Verhelst T *Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration* (1970) UCLA International Institute, James C. Coleman African studies Centre, Occasional Papers Series 40, University of California available at <https://escholarship.org/uc/item/33g2v27d#page-42> (accessed on 06/06/2015.) 1 16.

⁷⁹ Ibid 3.

⁸⁰ Allott ibid at 33 & 35. Allott's project was motivated by restatement projects carried out by the American Law Institute to ascertain the common law, and, by William Rattigan to ascertain Punjab customary law in India.

⁸¹ Twining W 'The restatement of African customary law: A comment' (1963) JMAS 221 – 222. See also Allott Ibid at 33.

⁸² For Kenya on marriage, divorce and succession, Malawi on marriage and divorce, Botswana on family law and Ghana on land law. Mwalimu C *Seeking Viable Grassroots Representation Mechanisms In African Constitutions Integration Of Indigenous And Modern Systems Of Government In Sub-Saharan Africa* (2009) 38.

The outcome of the project was meant to aid the courts in ascertaining customary law.⁸³ A presentation of the rigorous process of restatement embarked upon in the above project is worthwhile. The project lasted about seven years⁸⁴ and entailed the discovery of a long bibliography of published and unpublished materials, ranging from official documentations of customary law to private scribbling, monographs, reports, etc. that were:

[P]repared by anthropologists, sociologist, administrative officers, judges, commissions of enquiry, declarations, by-laws, or statements of customary law by indigenous customary and local authorities; and judicial decisions, if any, of higher and inferior courts.⁸⁵

Thereafter, law panels were established in collaboration with the government and consultations were had with different 'interest-groups'. There were also field studies, analysis and further consultations before the reports were edited and published.⁸⁶

Although this process produced Kenya's first restatement, the outcome was criticized because of the probable influence that Cotran's legal education had on his perception of customary law.⁸⁷ Cotran also excluded certain details that he considered vague, or with respect to which there were variations or disagreements.⁸⁸ His investigative and analytical methods were also described as failing anthropological standards. Indeed, Cotran may have been motivated to produce 'ideal rules and principles' of customary law rather than a restatement.⁸⁹ His omission of the records of customary courts was flawed because, as Roberts observed, 'the chance remark of a witness before the court' could have inspired a better understanding of the

⁸³ Woodman G *Eugene Cotran, Case Book on Kenyan Customary Law* (1987) Book Review available at <http://commission-on-legal-pluralism.com/volumes/32/woodmanoncotran-rev.pdf> (accessed on 03/06 2015) 149.

⁸⁴ Ibid, 222-223.

⁸⁵ Allott op cit note 77 at 34.

⁸⁶ Ibid. See also Twining op cit note 81 at 221-223.

⁸⁷ Twining ibid at 227.

⁸⁸ Ibid.

⁸⁹ Woodman op cit note 83 at 151. Simon Roberts 'Reviews' *Restatement of African Law vols 1 & 2 Kenyan 1, The Law of Marriage and Divorce* By Eugene Cotran. London: Sweet and Maxwell 1968 and *Kenyan II The Law of succession*. By Eugene Cotran. London: Sweet and Maxwell' 1968 204.

law than could have been obtained from discussions with informants' through interviews.⁹⁰ Another criticism suggest that Cotran's work had a fossilizing effect on customary law.⁹¹

Allott, responding to the latter criticism, stated that due to the evolving nature of customary law, restatement requires periodic reviews to keep it up to date.⁹² This however does not resolve the criticisms raised above.

Considerable concern has been expressed over the representativeness of consultations in a restatement exercise, particularly with respect to whether people subject to the customary law that is sought to be ascertained were adequately consulted.⁹³ Ubink has argued that concerns about the representativeness of consultations ought not to be fatal to Allot and Cotran's work since they assert that the project was done to aid judges in adjudication and not necessarily for the restated laws to be accepted by the people.⁹⁴ This argument defeats the aim of ascertainment, as it fails to acknowledge that the purpose of ascertainment is to determine the living customary law and that a restatement, to be useful to the courts, must record the actual practices of the people.

There have been notable works of restatement in Southern Africa. Schapera's 'A Handbook on Tswana Law and Custom' covered the Bechuanaland Protectorate.⁹⁵ Though the Batswana of South Africa are not part of Bechuanaland Protectorate, Prinsloo states that they also use Schapera's handbook.⁹⁶

Schapera claimed to have personally collected a vast portion of the Tswana law that he published from attending the tribal court sessions and from tribal informants who were viewed as authorities.⁹⁷ He also conducted ethnographic studies, examined official records and forwarded his compilation for comments from various district officials and academics.⁹⁸ Though a highly commended work, it remains subject to short falls of ascertainment mentioned earlier.

⁹⁰ Ibid.

⁹¹ Allott op cit note 77 at 35. See also Himonga C 'Taking the gap – 'Living law land grabbing' in the context of customary succession laws in Southern Africa' *Pluralism and Development: Studies in Access to Property in Africa* (2011) 116.

⁹² Ibid.

⁹³ Verhelst op cit note 78 at 42.

⁹⁴ Ubink op cit note 75 at 7.

⁹⁵ Schapera op cit note 54 at vii.

⁹⁶ Prinsloo op cit note 47 at 40.

⁹⁷ Ibid.

⁹⁸ Ibid.

There is also the limitation that it may not have captured variations in other communities that do not fall under the particular community studied despite the fact that the same language is spoken.⁹⁹

More recent works of restatement in South Africa include those carried out by the Centre for Indigenous Law, Faculty of Law University of South Africa, covering customary laws of Bophuthatswana, indigenous public law, Kwa Ndebele and Amaswazi.¹⁰⁰ The methodologies adopted in these projects entailed the compilation of a memorandum for field research and the collation of materials on the subject for empirical verification.¹⁰¹ The memorandum was flexible and adjustable to realities on the field.¹⁰² However, this project was criticized for being rule based and for being unduly reliant on interviews conducted on panels.¹⁰³ This is in addition to earlier criticism of restatement some of which also apply here. Prinsloo cautioned against the use of 'conceptualising law in abstract terms' which may not be well comprehended by informants.¹⁰⁴

The effect of all the identified short comings of restatement limits the authenticity of what is ascertained which will in turn affect the veracity of customary law versions ascertained and applied by the court. Adding to that is the fact that so far a high number of customary laws in South Africa are yet to be restated. Where restatements are available, the courts should receive evidence to confirm the restated practice.

In Nigeria, there are very few works on the restatement of customary law. In 1990, an attempt at restatement was made.¹⁰⁵ More recently, the Nigerian Institute of Advanced Legal studies did a restatement of various customary laws across Nigeria, focusing on chieftaincy and

⁹⁹ Schapera op cit note 54 at xxv –xxvi.

¹⁰⁰ Prinsloo op cit note 47 40-41. See also Myburgh A C *Indigenous Criminal Law in Bophuthatswana* (1980); Myburgh A C & Prinsloo M W *Indigenous Public Law in Kwa Ndebele* (1985); and Prinsloo M W *Inheemse Publiekreg in Lebowa* (1983).

¹⁰¹ Prinsloo op cit note 47 at 41.

¹⁰² Ibid.

¹⁰³ Ibid. at 44.

¹⁰⁴ Ibid.

¹⁰⁵ Which produced Federal Ministry of Justice *Towards a Restatement of Nigerian customary Law* (1991) series 'A compilation of the learned papers, speeches, and memoranda presented and delivered at the National Seminar on the Development and Codification of Customary Law in Nigeria, held on the 12th-14th of November 1990 at the Nigerian Institute of International Affairs, Lagos'. See also Arewa J A 'The evolution of the Nigerian legal order: implication for effectiveness, economic growth and sustainable development' NIALS JLPP 52-53. See also Mwalimu op cit note 82 at 38.

traditional institutions, inheritance, succession, land, and marriage’.¹⁰⁶ The exercise took four years. The aim was to establish the ‘common law of Nigeria’ by identifying commonalities in customary practices’ and jurisprudence and noting exceptions.¹⁰⁷

The methodology included:

[D]esk review; field research; collation and analysis of field research findings; testing of field research findings in a stakeholders consultative conference; further desk review to fill in gaps in the literature; and the core restatement work by a select committee of Reporters.¹⁰⁸

The work was published in 2013 and no work that analyses this effort for veracity was sighted during this research. However, the work could be subjected to similar challenges that restatements have been subjected to¹⁰⁹ and it still leaves the court with quite some discretion in the ascertainment and application of living customary law.

Restatement is usually done with the aim of unification. Achieving unification can be quite overwhelming since all customary laws must first be identified and ascertained, then variations identified and discarded.¹¹⁰ This cannot be done without first having a proper appreciation of the values of the cultures (whose laws are sought to be ascertained) as well as their respective legal systems. Otherwise the result will be a distortion of the customary laws. One advantage restatement can be said to have over codification is that if it varies from lived practices, the courts may disregard it for more credible evidence put before it since it is merely a guide to the courts. It however can influence the court in exercising discretion towards living customary law.

¹⁰⁶ Nigerian Institute of Advanced Legal Studies *Restatement of Customary Law of Nigeria* (2013) xi.

¹⁰⁷ Ibid xi & xii.

¹⁰⁸ Ibid x.

¹⁰⁹ However the details of the methodology observed needs to be critically analysed to discover for instance how many field researchers were utilised for this work covering a daunting population of about 170 million, who the field researchers were and their professional background, who were the participants in the stakeholders’ consultative forum and how were they selected and were they truly representatives of the people’s interest?

¹¹⁰ Gordon R ‘The development “problem” of legal pluralism’ in Tamanaha B Z, Sage C M & Woolcock M J V (eds.) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. (2012)139.

4.3.2.1.5 *Ascertaining through codification*

Codification is distinguished from restatement in that it is legislated customary law and is described as a ‘comprehensive and exhaustive statement of the applicable customary law on a given topic or area’.¹¹¹ It purports to be an exhaustive restatement of customary law inclusive of case law and statutory provisions on an issue.¹¹² The accuracy of describing codification as an ‘exhaustive statement’ of customary norms is doubtful since law makers cannot fully anticipate the entire circumstances to which a law will apply. This was explained by Hart when he buttressed why it is needful for courts to exercise discretion.¹¹³

Since legislated customary law becomes binding on courts and may only be amended or repealed by legislation, courts are not at liberty to disregard its provisions, especially so in South Africa and Nigeria where customary law is subject to legislation. This, in essence, would mean that living customary law will be subject to legislated customary law thereby impeding the judge’s discretion towards applying the living customary law ascertained during the trial. Though the codes serve ‘as a certain and convenient source of reference for the courts’, their short comings cripple their benefits.¹¹⁴

There are examples of codifications in South Africa. Courts have relied on the Transkei Penal Code of 1886, the Natal Code of Zulu Law of 1878 and the Natal Code of Native Law 1891 and amendments of 1932, 1967, 1981, 1985 and 1987.¹¹⁵ But they have all been criticized as distortions of Zulu law and their normative practices.¹¹⁶ Their compilation was devoid of in-depth research on Zulu law. There was a great deal of reliance on questionnaires filled by magistrates.¹¹⁷ It was stated that the Codes are “a model of how not to do it”.¹¹⁸ Yet, courts have relied on these official versions of customary law in South Africa.¹¹⁹

¹¹¹ Prinsloo M W op cit note 47 at 37.

¹¹² Black’s Law Dictionary Seventh Edition.

¹¹³ As discussed under 2.3.2 paragraph 9.

¹¹⁴ Prinsloo op cit note 47 at 38.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 39.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ For instance see the case of Mdhluli v Zuma 193 8 NAC (N & T) 164 where the Kwa Zulu Law on the Code of Zulu Law 16 of 1985 of the Kwa Zulu Legislative Assembly; the Natal Code of Zulu Law Proc RI~I of 1987 s 61 applied in the determination of lobolo to be paid on a bride.

Customary law in Nigeria is not codified¹²⁰ except with certain parts of the respective chiefs' laws of the various states of the federation. This is largely due to the seemingly daunting task it would require to adequately research, ascertain and record these laws and their numerous variations.¹²¹ With respect to chieftaincy matters, some works of codification have been carried out in some communities. The codes are subject to some of the criticisms discussed below.

One of the criticisms of codification is that it imposes customary law into positivist or centralist conceptual framework in which customary law is law because it is legislated by the state. This conflicts with the pluralist status of customary law as a heterogeneous system of normative values and practices.¹²² Flowing from this criticism is the fact that codified customary norms remain static and not flexible, are unable to evolve with current practices that have normative value. This ultimately impedes the development of customary law even by the courts. Where codifications fail to reflect the actual customary law of the communities, what is codified becomes a departure from the actual normative practice and an imposition altogether.

Consistent with this criticism, some attempts by colonial administrators to codify customary law have been described as inventions motivated by the interests of the colonial government.¹²³ The process of codification can also be manipulated. In Kenya, native elders were known to have provided versions of customary law to be recorded that served their interests over and above other members of the communities such as women and younger men.¹²⁴ This has also been the case in South Africa.¹²⁵

¹²⁰Mukoro A 'The interface between customary law and local government legislation in Nigeria: A retrospect and prospect' (2009) 4 (4) INGOJ available online at [http:// www.academicjournals.org/INGOJ](http://www.academicjournals.org/INGOJ) (accessed on 09/06/2015) 169.

¹²¹Elias T *Ground Work of Nigerian Law* (1954) 363. Elias observed that successfully codifying customary law in Nigeria is doubtful for reasons that the area is too wide to cover, the people's tendency not to give straight forward answers to official inquiries, and the ability of the investigator to combine interdisciplinary skills.

¹²² Prinsloo op cit note 47 at 37.

¹²³ Ranger T 'The Invention of Tradition in colonial Africa' in Grinker R, Lubkemann S C & Steiner C B (eds) *Perspectives on Africa: A Reader in Culture, History and Representation* (2010) 450.

¹²⁴Shadle B L 'Changing traditions to meet current altering conditions': Customary law, African courts and the rejection of codification in Kenya, 1930-60' (1999) 40 JAH 413.

¹²⁵Chanock M 'The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice' (2001). See also Bennett T W 'Re-Introducing African Customary Law note 54 at 6.

The fact that numerous versions of customary law could subsist within the same geo-cultural space, often among people of the same linguistic stock, also make codification very difficult. It is severely cumbersome to identify, harmonise and record the various shades of differences in the same cultural system.¹²⁶ Harmonization is in fact unadvisable, as it may result in the omission of nuances that make up the content of customary law.¹²⁷ This could severely impede the credibility and acceptability of the codified norms by the people who would be bound by them.¹²⁸ Sometimes, concerns about the credibility of the codification process revolve around the expertise of the experts that were used to ascertain the norms.¹²⁹

Amending to update codified customary law may not necessarily be a solution because of cumbersome processes and delays that bog legislative amendments.¹³⁰ Due to the evolving nature of customary law, there is no guarantee that the codified law is a statement of the normative practice at the time of codification. This has prompted some debate regarding the timing of codification since the law may be at the brink of evolving. Shadle, Odje and Pogucki as well as Azinge have argued that this ought not to preclude codification and it may be best to go ahead with codification and let the law evolve in its own stride.¹³¹ Their position however supports two versions of customary law – the codified version and the living version since untimely codification can result in diversions between the code and actual practice.¹³²

4.3.2.1.6 *Ascertaining through self-statement*

Currently, there is no identified self –stated customary law in Nigeria and South Africa therefore, the courts are not known to have utilised this method in their process of ascertainment and application. It is however discussed in this thesis because it is one of the methods of ascertainment and may find adoption in both countries in future.

‘Self-stating’, a term coined by Hinz,¹³³ refers to:

¹²⁶Ubink op cit note 75 at 3.

¹²⁷ Ibid

¹²⁸ Ibid. This was the experience in Tanzania in the 1960s.

¹²⁹ Ibid at 4

¹³⁰ Ibid. See also Prinsloo op cit note 47 at 37.

¹³¹ Ubink op cit note 75 at 5

¹³² Ibid.

¹³³ Hinz M O & Patemann H K (eds) *The Shade of New Leaves Governance in Traditional Authority: A Southern African Perspective* (2006) 9. He developed this concept during his research by the Centre for Applied Social

A process of ascertaining customary law by the owners of the law to be ascertained, namely the people – or, rather, the community to which the people belong – and the traditional leaders as the custodians of customary law.¹³⁴

The methodology adopted in self-stating customary law differs from community to community¹³⁵ but the common premise is that the ‘end product’ is derived from the community.¹³⁶ In other words, it is the community which decides what is written down as their law since once written, the customary laws become binding on the communities they derive from.¹³⁷

The pioneer self-stating experiment was conducted among the Ovambo, Kavango and Caprivi communities in Namibia and was coordinated by the Human Rights and Documentation Centre of the University of Namibia’s Faculty of Law.¹³⁸ Prior to this, certain traditional communities, on their own, began this experiment before Namibia gained its independence. Eventually, the Council of Traditional Leaders took on the venture and appealed to other traditional authorities to participate, and thereafter, it became a national project.¹³⁹ Self-stating is towards achieving certainty.¹⁴⁰ It is different from codification because it is the community that decides what their law is and what aspect of it should be self-stated, reduced in writing,¹⁴¹ or amended.¹⁴² According to Hinz, self-statement accommodates the evolving nature of customary law because it can be amended periodically to accommodate new changes. He

Sciences after documents containing customary laws written by the communities themselves were found. See also Hinz M O ‘Phase 1 of the Namibian ascertainment of customary law project to be completed soon’ (2009) NLJ 1.2.

¹³⁴Hinz M O ‘The ascertainment of customary law: what is ascertainment of customary law and what is it for? The experience of the Customary Law Ascertainment Project in Namibia’ (2012) 2.7 OSLs 91. This also includes the power of traditional authorities in Namibia ‘to make customary law’ by virtue of Section 3(3) (c) of the Traditional Authority Act.

¹³⁵Hinz M O *Customary Law Ascertained Vol 2 The Customary Law of Bakgalagari, VBatswana and Damara Communities of Namibia* (2013) 7.

¹³⁶*Ibid.* See also Hinz op cit note 134 at 91.

¹³⁷*Ibid.*

¹³⁸*Ibid* at 92.

¹³⁹Hinz op cit note 135 at 7

¹⁴⁰Hinz op cit note 133.

¹⁴¹*Ibid.*

¹⁴²Leonadi C, Issar D, Moro L & Santschi M ‘The politics of customary law ascertainment in South Sudan’ referred to in Kyed H M, Wiber M G ‘Self statement of customary law’ (2011) 18 JLPUL 63 119.

explained further that living customary law is not subject to the self-stated law,¹⁴³ and it accommodates unification, amendments and developments of customary law by the communities.

According to Ubink, based on her research on the Uukwambi Traditional Authority¹⁴⁴ in Namibia, self-statement enhances certainty by reducing judicial discretion in the application of customary law. She noted that villagers and the traditional leaders see this as a benefit.¹⁴⁵ This is no doubt commendable. However, Ubink admits that self-statement, even as a community driven exercise, cannot anticipate all the circumstances to which the law would be made to apply. Thus, self-statement is not exhaustive.¹⁴⁶ The achievement of certainty in the customary law of the Uukwambi should also be treated with caution due to the flexible nature of customary law and the effect of such certainty on it.¹⁴⁷ This is more so because despite Hinz's efforts to preserve the 'nuance, flexibility and negotiability' of the customary law in South Sudan, Leonardi *et al* wrote that it was doubtful that the project preserved these three elements.¹⁴⁸

Hinz had engaged a high number of assistants to help him with the ascertainment exercise, but Leonardi *et al* questioned whether they could maintain the 'level of sensitivity and understanding required to assist the recording of laws without influencing the process'.¹⁴⁹ The authors also questioned the usefulness of self-statement, pointing out that once they were recorded, chiefs are wont to treat them as codes and therefore give it precedent over other versions of customary law.¹⁵⁰ Lastly, they observed that negotiations and adjustments of customary law, which occur in courts, are often influenced by gerontological and hierarchical

¹⁴³ Ibid. Hinz also refers to the following in his footnote16 'D'Enge Ibronner-Kolff (1997, pp. 149ff) shows how traditional courts of the Shambyu community navigate between the self-stated version of their law and the legal principles behind such statement – thus allowing decisions appropriate to the cases to be made.'

¹⁴⁴ For five months from September 2009- February 2010 See

¹⁴⁵ Ubink note 75.

¹⁴⁶ Ibid.

¹⁴⁷ This point was reiterated in Leonadi op cit note 142 at 132.

¹⁴⁸ Ibid at 119

¹⁴⁹ Ibid

¹⁵⁰ Ibid.

contestations that cannot be captured by legislation or any form of 'written ascertainment' of customary law.¹⁵¹

Thus, as painstaking and inclusive as self-statement may be, it is not without challenges. The processes involved in self-stating, and the participation or representation of the community, are subject to self-serving interests, distortions, and the likelihood of alteration at the point of writing to reflect the writer's perception.¹⁵² The issue may then be raised, having regard to the processes involved in self-statement and the criticisms they attract, whether self-statement is law? If it is, then it is codification with a difference with regard to the fact that it is people rather than state driven. Secondly, since it is subject to credible contradictory evidence of living customary law, it may only be regarded as a *prima facie* evidence of normative practices. Therefore, every self-statement presented in evidence in the process of ascertainment must be analysed in order to determine whether or not it should be admissible as representing the people's customary law.

4.3.2.1.7 *Ascertaining through legislation*

Under South Africa's Law of Evidence Amendment Act and Nigeria's Evidence Act, legislation is one of the categories of that which courts can take judicial notice of. Where customary law has been legislated, proving it would be less cumbersome and straight forward. Examples of such legislation in South Africa are the Reform of Customary Law of Succession and Regulation of Related Matters Act.¹⁵³ In Nigeria, the chieftaincy laws enacted during colonial times and thereafter for regulating the appointment and deposition of traditional chiefs¹⁵⁴ and Nigeria's Land Use Act of 1978 which unified the regulation of land interest including customary land

¹⁵¹Ibid at 132.

¹⁵²Hinz op cit note 134 at 91 & 94.

¹⁵³No 11 of 2009.

¹⁵⁴Oyemakinde W 'The chiefs law and the regulation of traditional chiefs in Yoruba Land' (1977) 9.1 JHSN 63.

ownership are examples.¹⁵⁵ There have been 'legislations by traditional authorities' whereby local government councils adopt bye-laws that emanate from traditional chiefs as representing the customary law of their particular community on a particular subject.¹⁵⁶

Legislation on customary law is often a product of law reform commissions in Nigeria and South Africa. The National and Provincial legislature in South Africa are empowered to make such laws.¹⁵⁷ In Nigeria, federal and state legislatures can make laws regarding customary law. However, as pointed out earlier, legislation may not be the most efficient method of ascertaining customary law. The outcome will be subject to the criticisms already discussed.

Legislation has been used to supposedly achieve the harmonization and unification of customary law. Although the case for legislating customary law mostly hinges on achieving certainty, certain factors defeat this. First, as discussed earlier, it would crystallise customary law. Secondly a flawed process of investigating customary rules would result in legislating distortions.¹⁵⁸ Thirdly, even if the customary rules were correctly ascertained, it would not accommodate all variations; and it would certainly also not envisage all possible circumstances that could arise in the application of the customary law. Under these circumstances, the courts would still need to exercise discretion in the ascertainment and application of the law in cases before them.

In the rare instances where customary law is correctly ascertained and legislated, normative practices within the communities may yet evolve, and an amendment to the legislation may not be a practical solution because legislative amendments involve cumbersome, complicated and protracted processes. However, where the legislation does not

¹⁵⁵ Allott A N 'Nigeria Land Use Decree 1978' 1978) JAL 22.02 136. The Supreme Court had initially held that the Act abolished customary law interest.' See *Akinloye v Ogungbe* (1979) 2NLR 282. See also in Agbosu L K 'Extinction of customary tenancy in Nigeria by the Land Use Act: *Akinloye v Ogungbe*' (1983) 27.0 JAL 188. See also *Nwokocha v Governor of Anambra State* (1984) 6 SC362 in Nwauche E S 'Constitutional challenge of the integration and interaction of customary law and the received English law in Nigeria and Ghana' (2010) 25 TSLR 51. However, the Supreme Court eventually reversed its position by stating that the status of customary law interest in land was preserved by the Land Use Act. See *Abioye v Yakubu* (2001) FWLR (part 83) 2212.

¹⁵⁶ Verhelst op cit note 78 at 32. For instance see the Native Authority Ordinance of Western Nigeria in 'Ajayi 'The Integration of English Law with customary Law in western Nigeria: *Journal of African Law* 98 105 (1960)' in Verhelst ibid. See also the Western region Local Government Law cap 68 (1962).

¹⁵⁷ See the preamble to the Superior Court Act 10 of 2013 of South Africa.

¹⁵⁸ Molokome A 'Legislating in matters of customary Law: Issues of theory and method' in Bennett & Runger (eds) op cit note 22 at 64.

represent the normative practices of the community, it does not necessarily aid ascertainment process by the courts.¹⁵⁹ Nonetheless courts are compelled to enforce them.

4.3.3 Summary

No doubt, while all the methods discussed above aid the courts in its process of ascertainment and application of customary law, they are not without impediment based on the criticisms also discussed. This is with respect to the process employed in each method to ascertain customary law whether they meet anthropological standards to ensure that what is ascertained represents the normative practices of the communities. Other impediments are tied to the challenge of capturing all nuances, negotiability and variations within communities and capturing customary norms through Eurocentric lens. This will result in distortions and rigidity, would impede its evolvement and flexibility and create gaps in the captured laws.

Courts are compelled to utilise the outcome of some of these methods such as codification and legislation as against credible evidence of living customary law. The degree of discretion the judge can exercise in such circumstances will be restricted to filling up gaps not covered. While self-statement and restatement are subject to similar impediments mentioned above, they are still subject to credible evidence of living customary law and would thus not on their own impede the court's discretion towards ascertaining and applying living customary law. Witnesses and experts are subject to their own challenges which are reliability of their testimonies for whatever reason, but stand the chance of presenting credible evidence of living customary law upon which the judge must exercise discretion to ascertain. While the use of assessors is beneficial to the court, their opinion should be available to the open court and be subject to cross examination by the parties for verification. Texts, manuals and other written works are persuasive but, in most cases, are not available and are outdated. However, they are also subject to verification by the communities and would also on their own, not impede the application of living customary law.

¹⁵⁹See the Chair's research and *Ndadili Mocha & 11 Ors v Etsu Nupe & 4 Ors* Unreported NSHC/MN/144/2001. Where the chieftaincy law was distinct from the evolved customary norm on chieftaincy. This is discussed in chapter seven.

4.4 Conclusion

The provisions of both laws on evidence regarding the ascertainment of customary law are required to apply to the regular courts. However, the lower courts are statutorily required to apply the applicable customary laws in ascertaining and applying it and it is in doubt whether the customary courts in Abuja actually adhere to this.

Despite the statutory prescription of proof of customary law as facts through evidence, reliance on the various methods of ascertainment by courts as aids in the process of ascertaining and applying customary norms to cases cannot be avoided. They are usually adopted in the process of ascertaining customary law. These methods where they guarantee certainty, also, violate certain salient features of customary law in the area of flexibility and evolution. Whilst these methods assist the courts, their shortcomings leave room for judges to exercise different degrees of discretion. How this discretion is exercised could enhance or mar what is ascertained as customary law.

It has been shown in chapters three and four in Part B that the legal framework and approaches of ascertainment utilised by the courts determine at least to an extent how the judges exercise discretion towards ascertaining and applying living customary law. In Part C, factors that influence how this discretion is exercised will be identified.

PART C

Factors that influence the ascertainment and application of customary law in courts – Nigeria and South Africa

Chapter Five

Common factors that influence the ascertainment and application of customary law in courts of superior jurisdiction in Nigeria and South Africa

5.1 Introduction

It is important to state that 'Part C' comprises chapters five, six and seven, all of which identify factors that influence the ascertainment and application of customary law in Nigeria and South Africa's courts of superior and lower jurisdiction. While chapters five and six are on the superior courts, chapter seven is on the courts of lower jurisdiction. It is vital to reiterate here that this thesis is not explicitly comparative in essence, since its primary aim is to identify factors that influence how judicial discretion is utilised in the process of ascertaining and applying living customary law by courts. However, since the research utilises case studies from two jurisdictions, comparison, of necessity, is used as a tool.

The scope of this research is in line with what John Reitz writes is necessary in conducting a research in comparative law. Even though he referred to foreign law, his point resonates with the research of this nature which is on the utilization of a law the judges are not too conversant with but must apply. He explained that a proper grasp of the 'foreign law' must involve the description of the 'normal conceptual world of the lawyers' seeking the knowledge of another legal system.¹ This includes the sources of law, the gap between the law and the practice, and the deficiency between what is known about the law and what actually does occur in practice.² Hence the analysis of the applicable laws, the investigations of the courts' record of proceedings and the empirical data were all gathered to address these inquiries. By complimenting the rules with records of proceedings which include judgements, and, interviews, the thesis brings to the fore the practical realities which most times present a different picture from the law.³

¹John C. Reitz 'How to do comparative law' (1998) 46.4 AJCL 628.

²Ibid.

³Hoecke M V 'Methodology of comparative legal research' (2015) 7.

The interviews conducted revealed glimpses and insights of the judges 'philosophy, sociology and social culture' that impact on how they ascertain and apply customary law in cases before them. 'Black-letter law of statute'⁴ were also utilised, and they reveal their own range of factors.

Part C relates the accounts garnered from the interviews under different themes covered in the study.

This chapter therefore, identifies some of the factors that influence the ascertainment and application of living customary law by the superior courts in Nigeria and South Africa. The various factors identified are within the range of intrinsic and extrinsic dynamics to court processes and are based on the presentation of the data, and centred on the premise of the conceptualization, context and theories extensively discussed in chapter two. This appears to be more in line with the realists' point of view where the application of legal rules cannot be divorced from social and other factors related to it. This is opposed to that of legal formalists where legal rules ought to be simply applied by judges without any consideration to extraneous factors.

The factors are broadly categorized as Institutional, Substantive, Procedural, and, Socio-economic and Political factors. These factors fall under two broad categories of Common factors and Supplementary factors. Institutional and Substantive factors will be discussed under Common factors in this chapter, Procedural and Socio-economic and Political factors will be discussed under Supplementary factors in chapter six. The categories and classifications are based on my own creation based on common features and, to simplify the discussions on factors. It should be noted that the level or type of court of superior jurisdiction is not a relevant variable for the factors identified because the factors generally apply across the courts. However where there are factors distinct to a particular court type, it will be stated. It is essential to state here that this thesis does not claim to have identified all factors possibly present but merely identified factors that appear glaring to the researcher.

This thesis asserts that the exercise of discretion by judges in the ascertainment and application of customary law in cases before the court are influenced by these factors and they

⁴ Palmer V 'From Leretholi to Lando: Some examples of comparative law methodology' (2004) 4.2 GJF 5 & 6.

may either enhance, or impede the ascertainment and application of living customary law in courts. These factors are discussed below.

5.2 Common factors identified

These factors are discussed under the broad categories of Institutional factors and Substantive factors.

5.2.1 Institutional factors

The factors that fall under this category are connected by a common feature which is that their occurrence is determined by institutional arrangements directly or indirectly. These cover a range of factors from the judges' exposure to customary law under different circumstances to statutory requirements and are discussed here.

5.2.1.1 Exposure to customary law under different circumstances

This is particularly with respect to the judges' appreciation of customary law concepts through their exposure. This segment is focused on the judges' exposure to customary law under different circumstances which impact on their knowledge of its concepts and nature. Their exposure contributes to how they exercise discretion in ascertaining and applying customary law to cases before them in Nigeria and South Africa. The circumstances are taken one after the other.

5.2.1.1.1 Training and minimum requirements for appointment

The degree to which customary law is taught during the training of the judges determines, to an extent, how equipped they will be in handling customary law cases in their judicial capacity which also entails how they ascertain and apply it. Judges in both countries qualify first as lawyers and have no special training for the bench except for South Africa where the opportunity to occupy an acting position as a judge might give the prospective judge a form of experience. Unlike the situation in Nigeria, the legal profession is split between the attorney and the advocate in South Africa. However at the undergraduate level, the training is uniform for both attorneys and advocates and is mainly composed of substantive law and judges are appointed from either side.

There are uniform curriculum requirements for law faculties in Nigerian universities⁵ and customary law is not taught as a module. It is rather taught as a sub-topic under sources of Nigerian law which is a topic under Nigerian legal system.⁶ In South Africa, there is no national body that prescribes a general curriculum with respect to subjects that should be offered.⁷ This is determined by the respective universities even though the subjects offered across the faculties are generally similar. The implication of this is that the judges are not trained on a uniformed curriculum and each law faculty determines the curriculum of its law degree. Invariably, whether and to what extent customary law will be taught and the judges interviewed, except for two who were from a particular university, most indicated that customary law was a very small part of their curriculum.

For both countries, after the LL.B qualification, the second tier vocational training⁸ (for Nigeria) and the training for advocates⁹ and attorneys¹⁰ (for South Africa), is almost devoid of customary law. The result is that the judges have very little and limited knowledge of the subject. Central to both academic institutions is the emphasis on positivism and centralism in the theories, substantive and procedural law taught which produces students versed in Eurocentric conceptions and principles, and, a system that promotes state law hegemony. This relegates customary law to a position of very little prominence and invariably affects the

⁵The Council of Legal Education and the National Universities Commission regulate legal training and prescribe minimum course contents. National Universities Commission Benchmark Minimum Academic Standards for Undergraduate Programmes in Nigerian Universities Law April, 2007 'Decree (Act) No. 16 of 1985 contained in the National Universities Commission amended Decree (Act) No. 48 of 1988' 25.

⁶ There are also fleeting reference to it in family law and constitutional law. It may however be taken as an elective subject.

⁷ The Council of Higher Education in South Africa has mandated that LL.B curriculum must reflect cultural rights based on the Constitution and transformation agenda. Council of Higher Education, Higher Education Qualifications Sub-Framework Qualification Standard for Bachelor of Laws (LLB) (2015) available at http://www.che.ac.za/sites/default/files/Draft%20Standards%20for%20LLB%20v8final_Redy%20for%20Public%20Comment_20150807.pdf (accessed on 04/02/2017) 8. See also Penelope Andrews 'Law faculties must embrace difference to produce great graduates' (2016) available at <https://theconversation.com/law-faculties-must-embrace-difference-to-produce-great-graduates-59927> (accessed on 04/02/2017).

⁸ At the Nigerian Law School.

⁹ Admission of Advocates Act, 74 of 1964. The courses taken at the bar exams include 'legal writing, motion court practice and procedure, ethics, criminal procedure and evidence and preparation for and conduct of civil trials'. See <http://www.sabar.co.za/law-journals/2014/april/2014-april-vol027-no1-pp08-11.pdf> 8 (accessed on 30/06/2016).

¹⁰ Attorneys Act, no 53 of 1979. See also section 14 of the Act. The courses taken include practice and procedure in the High Court and magistrates' courts, practical bookkeeping, practice, functions and duties of an attorney, the practice, functions and duties of a notary, law, practice and procedure of conveyancing. How about succession?

perceptions of the graduates. Of all the judges interviewed in both Countries, only two, i.e. one in each country, did not offer customary law at all at the undergraduate level. For the judge in South Africa, his first exposure was as a high court judge while for the Nigerian judge, it was in practice prior to his judicial appointment.

The rule based legal education received by the judges hardly accommodates customary law which is more than rules. A proper understanding of its system would require the engagement of other disciplines to properly capture its essence, context and the scope of its application even from a jurisprudential level.¹¹ This situation confirms earlier scholarships that the content of legal education relegates customary law.¹² Therefore, the content of legal education received by the judges do not prepare them to efficiently adjudicate on customary law matters.

The minimum requirement for the appointment of judges of higher courts in both Countries is prescribed by their respective Constitutions.¹³ For South Africa, the Judicial Service Commission, and for Nigeria, the Extant Revised NJC Guidelines and Procedural Rules for the Appointment of Judicial Officers of All Superior Courts of Record in Nigeria 2014 provide for additional requirements.¹⁴ While knowledge in customary law is expressly required for Nigeria, it is not so for South Africa. The South African requirements however appear broad and can be interpreted to include knowledge of customary law since they include appropriate qualification, a broad reflection of the demographics of the Country,¹⁵ a good grasps of the values of the Constitution, competence, experience¹⁶ and legitimacy.¹⁷ Therefore, aside from the academic

¹¹ See 'teaching living customary law in decolonising (African) contexts with special reference to South Africa' faculty seminar presented by Prof Chuma Himonga, Chair, DST/NRF Chair in Customary law, Indigenous Values and Human Rights, University of Cape Town held on 8 June, 2016 at Level four, Kramer Building.

¹² Himonga C 'Goals and Objectives of Law Schools in Their Primary Role of Educating Students: South Africa The University of Cape Town School of Law Experience' (2010) 29.1 PSILR 56. See also Oba AA 'The Future of customary law in Africa' in Jeanmarie Fenrich, Paolo Galizzi & Tracy E Higgins (eds) *The Future of African Customary Law* (2011) 67.

¹³ See sections 231 (3) (b), 237 (2) (a), 256 (3) & 266 (3) (a) 1999 Nigerian Constitution. See also Section 174 (1) & (2) of the 1996 South African Constitution.

¹⁴ Which includes sound knowledge of the law and work experience. Rule 4 (i).

¹⁵ Section 174 (1) & (2) of the 1996 Constitution of South Africa.

¹⁶ Republic of South Africa Judicial Service Commission 'Summary of the Criteria Used by the Judicial Service Commission when Considering Candidates for Judicial Appointments' (2010) <http://www.capelawsoc.law.za/docs/Judicial%20appointments%20-%20criteria.Pdf> (Accessed On 23/03/2015).

qualification,¹⁸ knowledge and experience in the diverse normative systems of the South African peoples¹⁹ can adequately fall under 'competence, experience and legitimacy'. Since the courts apply customary law, knowledge of customary law could be a measure of the suitability of judicial candidates even though the training received by the judges did not cater for this.

In Nigeria, 'considerable knowledge of and experience in the practice of [c]ustomary law'²⁰ is required for a certain number of judges appointed to all the superior courts with jurisdiction to hear customary law cases except for the High Court.

The particular measure of what constitutes 'considerable knowledge in customary law' is uncertain. In considering whether a judge is versed in customary law, the Judicial Service Commission would look at the LL.B syllabus of the judge's training to see if customary law featured in the subjects taken.²¹ Incidentally, the justices of the Court of Appeal in Abuja are all presumed to be versed in customary law by virtue of the content of their training. Therefore, where there is an appeal to the Court of Appeal concerning the customary law of any community, if one of the judges is from that community, he would be presumed to be versed in the particular customary law and would be made part of the panel to hear the case.²²

Two categories of judges are appointed into the customary court of appeal. While some are legal practitioners, others are not but all are required to be versed in customary law.²³ Currently, all judges at the FCT Customary Court of Appeal, are qualified legal practitioners. A retired judge of the customary court of appeal appointed under the category of a non-legal practitioner incidentally, had an LL.B before his appointment even though he did not proceed to the vocational school for license to practice. He was appointed on the basis of his being

¹⁷R E Badejogbin 'The application of different normative systems in the adjudication of cases in Nigerian and South African courts: Are the Judges Adequately Equipped for this?' in Diallo F & Anamzoya A (eds), *Legal Pluralism in African Courts: Actors, Institutions and Governance* (Leiden-Boston: Brill, Forthcoming, 2017).

¹⁸DGRU 'Judicial selection in South Africa' (2010)

<http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf> (accessed on 30/06/2016) 21-25. The Democratic & Governance Rights Unit (DGRU) is an applied research unit within the Public Law Department at the University of Cape Town.

¹⁹DGRU *ibid* 19. The other values are independent minded, fair, impartial, judicial integrity, judicial temperament and 'commitment to constitutional values' 34 – 36, 40.

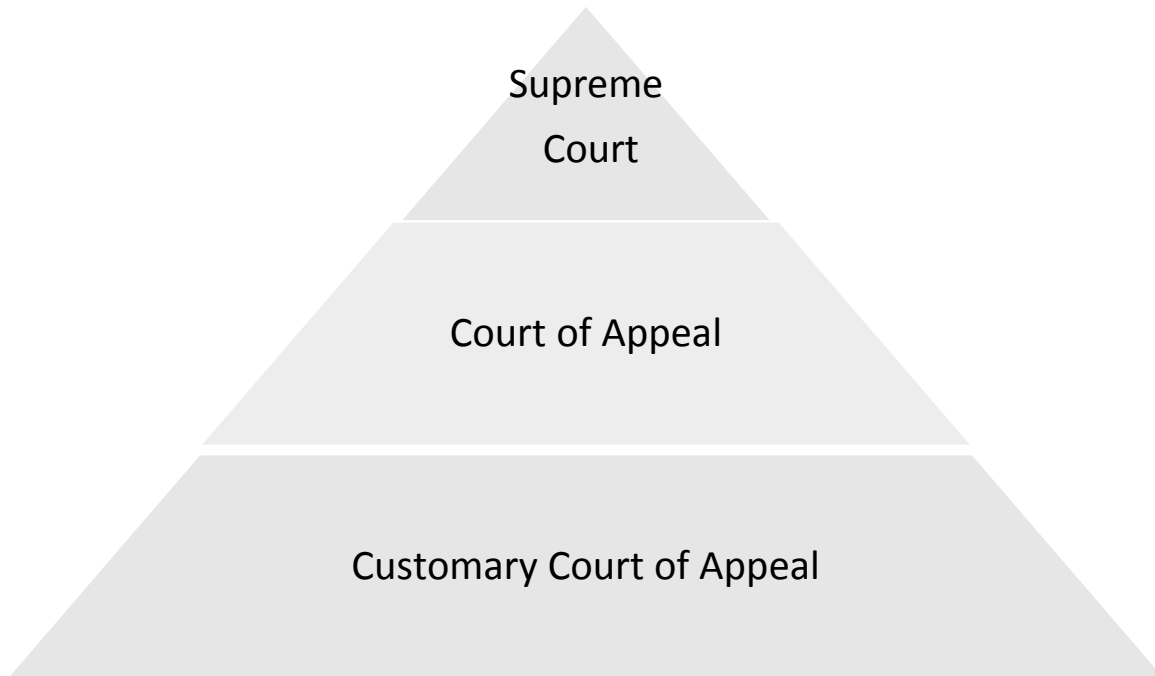
²⁰While some may not be legal practitioners, some must be legal practitioners of ten years standing. Sections 237 (2) & 266 (3) (a) & (b) 1999 Constitution. In section 288 (1) (b), knowledge of customary law is required for some appointment to the Supreme Court and the Court of Appeal.

²¹ From interview conducted.

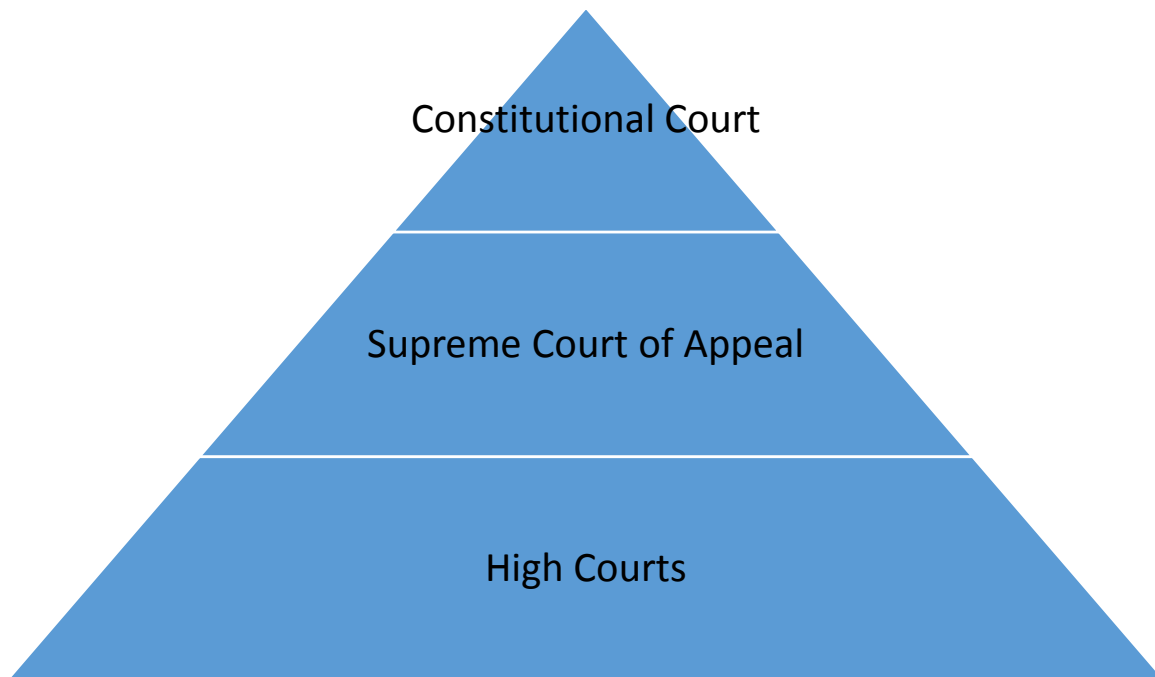
²² From interview conducted.

²³Section 265 (3) (a) (b).

originally from the community where the court is based and thus was exposed to the customary norms of that community. If his appointment was meant to provide an unadulterated perception on customary law, his LL.B may have tainted it.



Nigeria



South Africa

Judges of higher courts expressly required by statutes to have knowledge in customary law in the lighter colour

Both indigenous and non-indigenous judges in both countries benefitted however little from the paltry reference to customary law in the curricula and derived a basic understanding of its concepts at least to an extent. This applies to its methodological and sociological distinctions as well as its basic principles at varying and minimal levels.²⁴ There was also an assumption that by virtue of this exposure, they can now be regarded as versed in it. As one judge responded when asked if being taught customary law during the LL.B broadened her understanding: 'Of course it did because I wasn't exposed to all this at all. It did. I now know the various customs from one tribe to the other, yes.' This is apparently an overrated assessment since not much can be garnered from a subtopic in a semester's course. It also poses some dangers to think that one has learned so much when there is still so much more to comprehend. Two judges however, one from each of the countries, had the benefit of being taught by some individual lecturers whose interest in customary law drove them to more in-depth research from which they profoundly impacted their students and stirred them to further anthropological texts and courses. Judges who were students of such academics displayed a profound understanding and appreciation of the concept of customary law and its jurisprudence regardless of their race. Both went on to obtain their Ph.D. in related fields to customary law, and have published in this.²⁵

5.2.1.1.2 *Exposure to customary law in legal career*

A judge's exposure to customary law is not guaranteed merely because the judge spent some time in law practice prior to the judicial appointment. It is common for both countries that while some judges did not engage with customary law at all in their legal career, most, aside from their limited exposure to customary law in their studies, further engaged with customary law cases in their legal practice. Some in academia, taught and researched customary law, and

²⁴ By admission of the participants.

²⁵ For the Nigerian judges, customary law was a major part of his LL.B curriculum in the subject Property Law and constituted about half of the subject Introduction to Nigerian Law and it was taught for about half a semester in Land law. It was also taught in Jurisprudence and in 'Family Law' as well as at LL.M in a comparative analysis of the philosophical foundation of law. He engaged extensively with customary law in his research right up to his Ph.D. He extensively engaged with customary law in his academic career up to the rank of an associate professor and while in private legal practice and had a number of publications in the field. He convened the LL.M programme on International Human Rights which extensively engaged with customary law jurisprudence.

in South Africa, some also directly worked with communities and attended traditional court proceedings as observers. For another still in academia, the engagement with customary law came in the work at the legal aid clinics where cases involving customary law such as family law and labour related cases were handled. This entailed much time spent in rural communities.

One of the judges who worked as a maintenance officer in the magistrate court in South Africa acquired extensive knowledge and exposure in her role as a maintenance officer in the villages in the areas of the application of family law with regards to women, men, children, and the role of traditional leaders. This gave her a good grasp of the concept and nature of customary law. The degree of experience in customary law cases while in legal practice and other professional endeavours, such as academics prior to their appointments, range from none, little to extensive. The determining factor is tied to interest, opportunity and location.

Judges interviewed at the Constitutional Court had their first engagement with customary law in their judicial capacity at the Constitutional Court. Incidentally, this was in the novel cases that created precedent. This is because they were not career judges but were appointed directly from the academia. Some had extensive engagement with customary law before their appointment. There was no such category in Nigeria because judges are not appointed directly into the Supreme Court.²⁶ However, a judge appointed from academia to the high court who rose through to the Supreme Court had extensive engagement in customary law. Some judges in both countries had their first engagement with customary law as judges, at the High Court.

Judges' exposure to customary law is also determined by the jurisdiction and location of the courts where they served. While other judges had very little engagement with customary law at the high court due to the urban setting of where the court is located,²⁷ their experience in practice or academia prior to their elevation to the bench aided them at the higher appellate courts. All these engagements enhanced their understanding of customary law concepts and its application.

While some judges had substantial experience in customary law prior to their appointment to the higher bench, some did not irrespective of whether they were in legal

²⁶This is however changing with calls for nomination of Supreme Court justice from the academia and law practice.

²⁷Location such as Port Elizabeth.

practice or served in the lower bench. In Nigeria, those who served as magistrates seldom adjudicated on customary law matters. One of them had indeed served for over ten years as a magistrate and as an inspector of area courts but did not handle any matter on customary law.²⁸ At the higher bench, judges who served in courts which had no jurisdiction in customary law²⁹ before their elevation to the Court of Appeal due to the jurisdictions of these courts, had their main exposure to customary law matters at the Court of Appeal. One of them stated:

From my experience, I never tried any of their matters, or adjudicated or received complain in respect to any customary law indigenous to those areas. I never had the opportunity of seeing how they prove their own customary law, what it looks like.

From this category, a judge handled substantive number of cases in customary law at the Court of Appeal.

Another dimension to exposure is at the background of the judges even though it is outside institutional influence. Here, the level of the judges' exposure is not necessarily determined by race even though the race of the judges might be indications to be confirmed by further probing whether they were exposed under other circumstances. A judge of indigenous African descent is not by that fact alone necessarily exposed to customary law. Some were raised in urban settings outside their community of origin and in townships where indigenous norms did not feature at a practical level in the towns and in their families. Still under this category in Nigeria are those who regularly visited their community of origin where they were exposed to their customary practices. Others however who grew up in their local communities had observed and experienced the application of customary law at a practical level and have a greater appreciation of its concept, depending on the extent to which the particular family had imbibed western culture. Yet under this category are those whose communities of origin have become cosmopolitan urban settings and who were instead exposed to the 'westernized version' of customary law which might qualify as living customary law or as merely practical norms.³⁰ Others under this category in Nigeria were not exposed to their customary laws

²⁸ This is due to the location where he served which inhabits mainly adherents of Islam and matters taken to the areas courts were in that regard. Only one judge interviewed in South Africa had been a magistrate and he hardly ever handled customary law cases.

²⁹ Such as the federal high court and the sharia court of appeal

³⁰ This was explained in chapter under scope and limitations of research.

because their religious practice of Islam as a way of life replaced the customary norms. Judges of non-indigenous African descent did not have or observe the application of customary law in their backgrounds and had their first encounter during their undergraduate studies.

It is important to note that none of these factors stood on their own in determining the judges' knowledge and understanding of customary law. For instance, those who had no exposure from their background one way or the other encountered customary law in their studies, research and/or in practice and acquired a basic knowledge of its concept and nature albeit with Eurocentric flavours except for a few who further extensively engaged with customary law. In all, these were not without the influence of other factors discussed in the chapters under Part C. Quite worrisome however is the category of those who neither encountered customary law in their background, studies or during their career in law but had to adjudicate on customary law issues for the first time at the high court and appellate court.

5.2.1.2 *Grasps of the concept of customary law and its development*

A proper grasp of the concept of customary law is a factor that determines how customary law is ascertained and applied by the courts in both countries, and would impact positively on the exercise of discretion in its ascertainment and application. The discussion below is reflective of the situation in both countries. There appears to be a general appreciation of customary law by most of the judges who view it as a distinct source of law which is operational on its own principles, fact sensitive, contextual, local in its nature and designed for harmonious living in the community. Of all the judges interviewed, only two judges one each from Nigeria and South Africa, mentioned the necessity of exploiting anthropological factors in the ascertainment and application of customary law which, according to them, should come from the elders conversant with the application of the customs. This knowledge and understanding varies among the judges some of whom admit to having Eurocentric views that no doubt influence their perceptions of its concepts and principles. This is due to their law education which was heavily tilted towards Eurocentric conception of law and their background.

There was a dearth of understanding of its concepts by some judges. Some allude to the idea of written customary law for easier ascertainment without appreciating how the very idea

of having customary law in written form could alter its very nature and veracity. A judge explained that English law was codified and did not suffer the challenge of evolution so the same should apply to customary law. A judge at the customary court of appeal sees no difference between Common law and customary law concepts except that one is codified while the other is not and states that the concept of both is to do justice. This is particularly worrying since the customary court of appeal is primarily established for adjudication on customary law. A few judges did not know what it means to develop customary law.³¹ Another denies that there are uncertainties in customary law.³²

5.2.1.3 Statutory requirements

The provisions of the law that regulate the ascertainment of customary law also influence how it is ascertained. On one hand, the Nigerian Evidence Act defines custom as ‘a rule which, in a particular district, has, from long usage, obtained the force of law’ and then it requires that judicial notice can be taken of customary law if it had been adjudicated upon only once. It differs from the provision of the repealed Evidence Act which required that judicial notice of such can be taken only if the issue has been notoriously addressed by the courts. Under the old Evidence Act, the judge is restrained from taking judicial notice of a customary norm, unless he/she is satisfied that it had been notoriously tackled in adjudication. The case of *Orlu v Gogo-Adebite*³³ clearly illustrates this. Here, the plaintiff sued the defendant for a piece of property which he claimed he inherited from his father under *Ikwerre* native law and custom. Even though he had title documents as evidence of his ownership, he had lost them during the war. The court held that aside from his evidence, no further evidence was led on the content of *Ikwerre* native law and custom on inheritance upon which he based his claim. The court therefore could not take judicial notice of the custom not having been notoriously dealt with by

³¹Though there is as yet no clear definition of development, it appears to refer to the process of bringing it in conformity with constitutional provisions while retaining its essential character. According to Lehnert, this is akin to development in common law context where development of the rule means the ‘formulation of new rules either by creating them or reformulating old ones’. This is done passively where the court adopts development made by the community or actively where the court itself develops the rules. See Lehnert W “The role of the courts in the conflict between African customary law and human rights’ (2005) 251.

³²Ibid at 252.

³³PHC/171/86.

the courts. At the time this case was heard in court, the Evidence Act required notoriety. This decision was upheld by both the Court of Appeal and the Supreme Court.

Since notoriety is no longer a requirement, it should not impede the application of judicial notice where necessary. But would the less stringent requirement actually aid the exercise of discretion towards living customary law. The judges interviewed emphasised current norms as what ought to be ascertained and applied. However, the definition of custom pins it to that which has been in 'long usage' and will point more towards ascertaining old rather than the current normative practice of the people.

On the other hand, for South Africa, the key requirements for taking judicial notice according to section 1 (1) of its Law of Evidence Amendment Act is 'readily' ascertainable with 'sufficient certainty'. As discussed under 3.4.2.1 in chapter three, 'readily ascertainable' has been associated with the written form of the rule of customary law sought to be ascertained and applied. The courts have a wide range of discretion in determining if a customary law has been proved with 'sufficient certainty'. The implications for these is that reliance on written forms would impede the ascertainment and application of living customary law as discussed under 4.3.2.1 in chapter four. However, 'sufficient certainty' gives opportunity for living customary law to be ascertained and applied by the court as was done in *Mayelane v Ngwenyama and Anor.*³⁴ Here the Judges at the Constitutional Court took further steps to be sufficiently convinced of the applicable customary norm on whether or not the consent of the first wife is required for a valid subsequent polygamous marriage by the husband. In such an instance, the Constitutional Court could have restricted itself to the issues before it and rule that the living customary law was proved. However, the Constitutional Court thought it essential to sufficiently confirm the customary rule beyond 'mere assertion' by the person relying on it and her witness since the outcome would invariably apply to members of the broader community.³⁵

³⁴(CCT 57/12) [2013] ZACC 14.

³⁵Ibid para 47.

5.2.1.4 *Protection of the status of statutory law over customary law*

In South Africa, customary law is made subject to the Constitution and statute. Courts have therefore exercised discretion in the course of ascertaining and applying customary law, in favour of statutory provisions against evidence of living customary law as in the high court case of *Pilane & Anor v Pilane & Anor*.³⁶ This case tells of the struggle by certain segments of a traditional community to assert their rights under their customary law to hold meetings to enable them hold their leaders accountable. This was also to establish legitimacy, and to exercise their rights to secede from any leadership structure that impedes such accountability.

The first applicant is the Chief (Senior Traditional leader) of the Bakgatla Ba Baghafela community in Pilanesburg. Relying on the North West Traditional Leadership and Governance Act,³⁷ and the Traditional Leadership and Governance Framework Act³⁸ he sought an interdict against the respondents themselves or in collaboration with anyone from calling for such meetings. The applicant's position was that the Acts regulate and prescribe the application of customs and customary law in the process of resolution of disputes in the traditional community and the respondents have failed to follow such procedures.³⁹ According to the respondents, by virtue of their customary law, they have been mandated by the royal family and clans constituting the community to hold these meetings.

The high court and the Supreme Court of Appeal focused on protecting 'the terrain of constitutionally recognised structures' based on the legislations referred to above by granting the interdict. This resulted in the violation of the respondents' constitutionally guaranteed rights to practice their culture and freedom of association, assembly and expression.⁴⁰ The Court was also reluctant to ascertain living customary law applicable in the circumstance.⁴¹ However, where the provision of the legislation specifically states that it was passed to ensure compliance with customary law, the courts ought to reconsider its position indepthly. The Framework Act⁴² expressly states that it was enacted to 'restore the integrity and legitimacy of

³⁶North West High Court case no. 263/10

³⁷No. 2 2005.

³⁸No 41 of 2003.

³⁹Sections 21 & 22 of the Traditional Leadership and Governance Framework Act, 2003.

⁴⁰See *Pilane & Anor v Pilane & Anor* (CCT 46/12) [2013] paras 16, 30 & 69

⁴¹See para 19 of the judgment Landman J of the North West High Court.

⁴²No. 41 of 2003.

the institution of traditional leadership in line with customary law and practices' so the court should have subjected its provisions to the applicable living customary law on the subject.

The heads of argument of the respondents (now appellants at the Constitutional Court) in *Pilane v Pilane*⁴³ introduced this line of argument and the court in a majority decision of 8 to 2 upheld their appeal on the ground that the respondents' rights to culture and freedom of association, assembly and expression are constitutionally guaranteed rights. This says much about what may spur the court toward the direction of ascertaining living customary law over official version.

5.2.1.5 Convergence of positivism and pluralism

The convergence of positivist and pluralist laws have varied implications which may or may not enhance the ascertainment and application of customary law and this is discussed under different circumstances.

First, it is important to state at this stage that legislation of customary law is done in two ways in Nigeria and South Africa: when customary rules are legislated and where the legislation merely states that the appropriate customary rules should apply. An example of the former is the South African Reform of Customary law of Succession which specifically prescribes purportedly, the content of customary law on succession. For Nigeria it is the Land Use Act which prescribes customary law interest in land.

Sometimes when statutory and customary law converge, the streamlined manner in which the statute preserves the space of customary law creates room for the ascertainment and application of customary law. For Nigeria, is the case of *Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle* which was on the applicable customary law governing ascendancy to the chieftain of Iragbiji.⁴⁴ Section 22 (2) of the Chiefs Law of Oyo State⁴⁵ provided that appointment of minor chiefs will be by customary law and shall be done by those entitled to appoint under customary law. The chief's law which is positivistic did not specifically state what

⁴³(CCT 46/12) [2013] ZACC 3.

⁴⁴ Unreported High Court Ikirun suit no. HIK/5/97, Court of Appeal Ibadan Appeal No. CA/I/118/99, Supreme Court Suit No: SC.345/2012.

⁴⁵Part 3 Cap 28 of 2000.Also applicable in Osun State.

the content of the customary law is, but provided for its application. By this, it preserved the space of living customary law and gave room for it to be ascertained. See also the cases of *Uwaifo v Uwaifo*⁴⁶ and *Agidigbi v Agidigbi*⁴⁷ both of which are on the application of the customary rule of male primogeniture to certain dispositions under the will of the deceased. Here, a similar provision in the Will's Law which is positivistic subjects the testator's freedom of testamentary disposition to the applicable customary law on certain items of the deceased's estate without stating the content of the applicable customary norm.

For South Africa it is the case of *Mayelane v Ngwenyama*⁴⁸ which sought to determine whether the consent of the first wife was necessary for a valid second marriage by the husband. Section 3 (1) (b) of the Recognition of Customary Marriages Act provides that part of the requirements of a valid customary marriage includes that the marriage must be done in accordance with the applicable customary law. Again, the positivistic law provided for the application of living customary law without spelling out the content of the living customary law. The implication is that it gives room for its ascertainment without any statutory hindrance. Also relevant is the case of *Segwagwa Mamogale v Premier North west province*⁴⁹ on the recognition and appointment of the traditional chief of the Bakwena Ba Mogopa Tribe where the applicable legislations in Section 9 (1) of the National Traditional Leadership Act⁵⁰ has a similar provision that traditional leaders must 'qualify in terms of customary law'. Section 13 (1) North West Traditional Leadership and Governance Act⁵¹ also states that the 'Bogosi'⁵² shall be according to the 'customary law and custom' of the community.

Common to these laws applied in these cases is that the content of the applicable customary rules were not stated. Instead, the wording of the statutes gives the court the discretion to ascertain what these rules are and this gives room for the litigants to lead credible evidence before the court on the current customary law. Here, the judges' discretion is not limited to official versions which might be distortions or obsolete, but is given a wide sphere to

⁴⁶Supra.

⁴⁷[1996] 6 NWLR 302

⁴⁸[1996] 6 NWLR (part 454) 300.

⁴⁹Unreported Case no 1156/2007

⁵⁰No 41 of 2003.

⁵¹No 2 of 2005

⁵²That is the chieftaincy.

determine living customary law from the evidence before the court. These provisions, enabled the presentation of evidence in these cases from notable elders, traditional chiefs, title holders (all these testified as custodians of the customs), experts and elderly members of the communities who testified on the contents of the living law. They put facts before the court to enable the ascertainment and application of living customary law.

Gaps exist in both categories but in varying degrees. For the former, the legislation cannot possibly cover all circumstances that can arise in the subject and the judge is open to the exercise of discretion. In the latter, a great deal of discretion is exercised by the judge because the content of the customary rule must be sourced. The exercise of the judge's discretion towards the ascertainment and application of living customary law is more enhanced by the latter since it presents opportunities for the parties to lead evidence on the current norms of the society while the former has the limitations discussed under 4.3.2.1.7 in chapter four.

The second point relates to the situation where precedent is given primacy over living customary law. A judge explained that he will give pre-eminence to judicial precedent over a living customary law credibly proved before him on the ground that the former has been established by the court. He would do otherwise only when it is proved that the practice has evolved. This is giving pre-eminence to official customary law over living customary law for no other reason than that a court of superior jurisdiction has ascertained it. This position either reveals a misunderstanding of conceptualization of customary law or a positivist conception of law based on centralism which elevates laws affirmed by the state over what is proven to be authentically applicable to the community who are the sources of their own law.

Thirdly, there are indeed challenges where the rules of positivism and pluralism converge. This is generally typical of cases in the formal courts. Certain rules of Common/Civil law still find their way in the consideration of issues under customary law and have been used to determine what weight should be given to dispositions which may have been given much weight under the applicable customary law. An instance is the misapplication of the rules of English law on customary law such as the Nigerian case of *Nwaigwe & Ors v Okere*⁵³ where the

⁵³Unreported CCA/OW/A/76/9.

customary court of appeal was not mindful that evidence of traditional history is an exception to hearsay rule. The Customary Court of Appeal rejected the evidence of the plaintiff's second witness – who was also a senior member of the defendant's family – on the traditional history of the defendant's family as told to him by his father on the ground that it is hearsay. 'Hearsay' as explained by the Evidence Act does not accommodate oral history under customary law as admissible evidence. But that is how historical accounts are passed from one generation to the other under customary law and the customary court where the matter was heard is not bound by such provisions in the Evidence Act. This convergence frustrates the application of the rule of customary law in the process of ascertainment.

This featured in South Africa on the issue of evidence based on oral history and backed by documents. Under statutory law, the author of the document must be indicated. However under customary law, credible account of the oral history of the origin of the document by persons recognised by the community as being in a position to know would be sufficient. A judge trained under the Eurocentric system and sitting in a formal court would be more inclined towards applying statutory rules of evidence as against customary law especially in the face of opposing evidence. This will place a stringent requirement on what may have sufficed under customary law. For instance, the judge in the case of *Bakgatla Ba Sesfikile Community v Bakgatla Ba Kafela Tribal Authority*⁵⁴ who despite oral evidence based on oral history to explain the origin, the authors, content and the circumstances that gave rise to a document presented by the applicants to prove their ownership of land purchased by their ancestors, held that it was not 'authentic' because the author is not indicated on the document.

One of the judges explained that one of the difficult issues at the Constitutional Court with respect to identifying the content of customary law is that 'we no longer have a perfect system of customary law, it's been inevitably and probably unavoidably tainted by its experience of colonialism' and the fact that customary law methodology is bottom-up while that of a constitutional democracy is top-down and this creates a crisis.⁵⁵ For instance, the

⁵⁴Unreported North West High Court Case no. 320/11 (2011) para 34

⁵⁵Bekker and van de Merwe have submitted that there were instances in which the judgments given by Appeal and Commissioners' Courts on the contents of customary law hardened into law. I criticise this process as an aberration in customary law and an imposition of distortions. Bekker J C & van de Merwe I A 'Proof and ascertainment of customary law' (2011) 26 SAPL 118.

equal treatment of women at the bottom up system evolves gradually at different levels in communities at a pace not acceptable to a constitutional democracy which would expect an instant solution to such challenges. For this reason, some of the judges interviewed explained that a determining factor that directs their exercise of discretion is that they gravitate towards that version which most accommodates the provisions of the bill of rights. Expectedly, all the cases involving the ascertainment and application of customary law at the Constitutional Court were decided on the basis of constitutional rights.

A fourth point concerns the intricacies of the state's legal structure at the federal, state and local government levels and the applicability and implications of international treaties on a community that wishes to tap into its provisions. A good example is the case of *Ndadili Mokwa & 11 Ors v Etsu Nupe & 4 Ors*⁵⁶ which concerns the cultural right to self-determination of the Mokwa people to choose their leaders from among themselves as against the practice of importing leaders for them from the royal house of Bida which is not part of their community. The plaintiffs relied on the African Charter on Human and Peoples' Rights (Ratification and Enforcement)⁵⁷ (which provided for their right to cultural identity, liberty and development), historical (oral) traditions of the Mokwa people and Local Government Law of Niger State.⁵⁸ They also relied on the provisions of the North Western Policy Statement of Administration and Local Government Reform⁵⁹ which provides that their leaders be appointed from persons indigenous to their community. According to them, the provisions of the Policy began to be applied in 2000 and they have since accepted this as their custom.⁶⁰ The court held that local government matters are within the purview of state legislations and not federal legislations, therefore, the ratification of the African Charter by the national legislation has no effect on Niger State since it is yet to be ratified by its House of Assembly. It stated further that the Local Government Law of Niger State regulates chieftaincy matters which supports the practice of appointing chiefs for Mokwa from the royal house of Bida. Therefore, the plaintiffs' current

⁵⁶ Unreported NSHC/MN/144/2001.

⁵⁷ Sections 17 (2-3), 19, 20 & 22 of the Act Cap 10 Laws of the Federation of Nigeria 1990.

⁵⁸ 2001.

⁵⁹ 1970.

⁶⁰ It was eventually discovered that the policy statement was never formally affirmed.

customary norm cannot be recognised as regulating the appointments of its chiefs. Again, the court decided in favour of statute over the applicable customary law.

5.2.1.6 *Summary*

The institutional factors discussed pertain to judges' exposure to customary law, statutory requirements of what constitutes customary law, protection of the status of statutory law over customary law, and the implication of the convergence of positivism and pluralism.

In both Nigeria and South Africa, there are different circumstances under which a judge may have been exposed to customary law which are at their background, during studies and in their legal careers. Generally, the judges had very little exposure from their studies despite its featuring as part of their curriculum. Only very few were raised in communities where they were exposed to the practice of customary law. Even though likely, it is not determined by their race. However, these exposures do not on their own determine whether or not the judges had enough knowledge and appreciation of the nature of customary law. Though these factors contribute to how the judges exercise discretion in the ascertainment and application of customary law, they must be considered with other factors discussed in Part C.

It is a problem where statutory requirement of what constitutes customary includes features that exclude the nature of living customary law as the definition of customs in the Evidence Act in Nigeria. The statutory definition by South African statute discussed is broad enough to accommodate the features of living customary law. Again the protection of the status of statutory law over customary law compels courts away from the ascertainment and application of living customary law. The implication of the convergence of positivism and pluralism on the ascertainment and application of living customary law is determined by how legislation on customary law is framed. Where precedent is given primacy over living customary law, the misapplication of Common/Civil law rules on customary law and the implication of how the legal structure of the level of government affects the ratification of relevant treaties that promote the application of customary law have all influenced the exercise of the judges' discretion away from the ascertainment and application of customary law.

5.2.2 Substantive factors

These pertain to the substantive knowledge or content of the law that one way or the other, impact on how judges exercise discretion in the ascertainment and application of customary law. They include the methods of ascertainment utilised by the judges, the judges' prior knowledge and the college sitting of the court, judges' perception of judicial discretion, the Constitutional mandate, Constitutional compliance, achievement of justice, repugnancy test, and consideration for legal certainty.

5.2.2.1 *Methods of ascertainment utilised by the judges*

Judges utilise judicial notice and proof as facts through evidence to ascertain customary law by using the varied methods which comprise precedents, texts, writings, codes, legislation, experts' evidence as well as evidence from people of the subject communities collectively or alone.⁶¹ These methods have been discussed under 4.3.2.1 in chapter four. The way and manner these methods were utilised is dependent by the judges' substantive knowledge of them and influenced the court's ascertaining and application exercise in Nigeria and South Africa and it is discussed below.

5.2.2.1.1 *Use of precedents*

Precedents were used in certain instances as persuasive authority of specific customary norms which may not necessarily be of the particular community being considered in the court.⁶² Its usefulness in such instances were persuasive. Due to the distinctions or variations in the customary practices of diverse communities, most judges would prefer evidence of lived experiences. Such judges would give priority to credible evidence of reliable witnesses who convincingly contradict such precedent with respect to the content of living customary norms within their community. There are however others who would give priority to precedence over the evidence of such reliable witnesses simply on the ground that they are bound by the *ratio decidendi* of a court of higher jurisdiction. This is an indication of a faulty understanding of the

⁶¹*Southon v Moropane* (755/2012) [2014] ZASCA 76. Here the Supreme Court of Appeal confirmed the decision of the high court which stated that 'I find the respondent's version, as fully corroborated by her witnesses, the independent and objective evidence of photographs and the behaviour of the parties ... and importantly the evidence of the two expert witnesses, to be consistent with the existence of a valid customary marriage.'

⁶² The magistrate in *Bhe V Khayelitsha* supra para 22 was guided by the high court's dismissal of the appeal in *Mthembu v Letsela* challenging the rule of male primogeniture as unconstitutional.

concept of living customary law. Courts have also relied on cases from the Native Authority Courts as reported in H W Warner's Digest of South African Native Customary Case Law⁶³ without cross checking with the records to confirm its accurate reflections of the cases.

Even though judicial precedents that are available do not cover the various customary norms, precedents on broad principles of customary law have been applied by the courts where the parties affirm that they apply to the applicable custom. The outcome of what is ascertained and applied by the court is therefore dependent on whether the precedents are rightly or wrongly applied. Some judges in Nigeria indicate that they will rely on precedents on the condition that it must first have been notoriously dealt with in a number of cases. This is regardless of the statutory provision that states that judicial notice can be taken based on a single case but this caution is in favour of ascertaining and applying living customary law. A judge (who has adjudicated on several customary law cases) explained further that he may deviate from utilising precedent only where the facts are distinguished regardless of contrary credible evidence placed before him.

5.2.2.1.2 *Use of texts*

So far very few texts exist on the customary laws of the various communities in South Africa and Nigeria. Texts are relied upon by the courts to prove or confirm a customary norm. The Supreme Court of Appeal in *Mthembu v Letsela* held that succession in customary law is based on male primogeniture and referred to texts such as Bekker, Seymour's customary law in Southern Africa⁶⁴ and Bennett's A Source Book on African Customary Law,⁶⁵ There was no attempt to determine what the norms were at the community level but rather upheld the male primogeniture on the assumption that it was the customary law and more so that it had legislative backing.

A good number of the texts relied upon by the judges to confirm current normativity are old texts written decades ago and may be obsolete and may be only useful to confirm norms

⁶³ 1894-1957 (1961), 1958-1962, and 1996-1997. Based on interview conducted.

⁶⁴ On page 278.

⁶⁵ On pages 399-400.

that operated during the period covered in the text.⁶⁶ Sometimes they were used as sources with respect to certain customary norms of general application such as the concept of communal land ownership in South Africa or male primogeniture.⁶⁷

More recent texts utilised by the court may also not be very useful where they do not accommodate variations of the norms of the particular community sought to be ascertained but are relied upon by the courts as persuasive authorities. With the dearth of research materials on contents of customary law, texts written several years ago are utilised such as Anthony Allott's texts on customary law and, Paul and Laura Bohannan's on Tiv customary law from the 1950s, G.B A. Coker on Yoruba customary law of land 1958, SNC Obi on Igbo customary law, 1963, and E I Nwogugu on family law first published in 1974. Nwogugu's text however was revised in 2014.⁶⁸ Texts are still plagued by the limitations discussed under 4.3.2.1.3 in chapter four.

5.2.2.1.3 Use of legislation

Where official customary law such as legislation, precedents and codes were relied upon, the courts felt bound to work with these official laws and thereby in some cases such as *Gumede (born Shange) v President of the Republic of South Africa & Others*⁶⁹ and *Bhe*, living customary law was not ascertained. In *Gumede*, the applicant applied to the court to annul the provision of section 7 (1) of the Recognition of Customary Marriages Act that excluded her from benefiting from the provision that made the proprietary consequence of her marriage as communal which is contrary to the applicable customary law. The applicable customary law was codified and bestowed all the property rights on her husband⁷⁰ who at that time had commenced proceedings to divorce her after over 40 years of marriage. In *Bhe*, the applicable

⁶⁶Such as J.M. Smalberger's text relied upon to prove the 'the long history of copper mining in Namaqualand by the indigenous people prior to the annexation in 1847' in the Richtersveld case. Though it was published in 1975, it was still useful because it covered the period relevant to the case. It is titled *Aspects of the History of Copper mining in Namaqualand 1846 – 1931* (1975) (Struik, Cape Town). See also the case of *Segwagwa Mamogale v Premier North West Province* where the judge cited R D Coertze's text titled *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (1971) to hold that a particular practice did exist in the community.

⁶⁷ See the *Bhe* and *Richsterveld*'s cases *supra*.

⁶⁸Nwogugu E I *Family Law in Nigeria* (2014) 3rd ed. Information given during an interview with one of the judges.

⁶⁹ (CCT 50/08) [2008] ZACC 23.

⁷⁰120 of 1998. Section 20 of both the Kwa Zulu Act on the Code of Zulu Law No. 16 of 1985 and the Natal Code of Zulu Law 1987, GG No. 10966.

customary law was the Black's Administration Act which also excluded the minor female children of the deceased from inheriting from their father's estate. The deceased's father was the beneficiary of the deceased estate and was going to dispose of the estate to pay for burial expenses and this would render the minor daughters of the deceased homeless. A few judges who presided in the cases of *Bhe*, explained that even though the case was based on male primogeniture rule validated by legislature, the principles had been endorsed by the courts. The court held that it was also a rule of living customary law because the father of the deceased was set to enforce his right of ownership by selling the house and none of the parties disputed that it was not a rule of customary law. It also held that it was the reality that confronted the plaintiffs therefore the court did not find it necessary to ascertain what obtained at that time, in the particular community but had to subject the patriarchal practice to constitutional scrutiny. The same explanation applied to the assertion in *Gumede*, which is that the woman had no rights to the property. The court's decision was that to the extent that these rules were applicable, they were unconstitutional. In other words, reality superseded living customary law (if different).

Subject to the limitations of official customary law, where the provisions of the statute is in line with the living customary law, since the court feels bound by statutes, the application of the statute will be the application of living customary law. This may however be hampered by other considerations. Such was the case in *Segwagwa Mamogale v Premier North West Province*⁷¹ where sections 15 and 16 of the North West Traditional Leadership and Governance Act⁷² provides in line with the applicable living customary law as admitted by the parties in the suit. The Act provided that where a chief dies and the successor is still a minor, the royal family of the community shall in accordance with the customs 'assume leadership on behalf of the minor and inform the premier of the regent identified for appointment.' The court affirmed the regent's selection as being in line with the Act but refrained from granting an order for his appointment by the premier stating instead that the applicant should wait for the premier to get to it. The implication of the court's decision left the applicants and his subjects in a helpless

⁷¹Unreported North West High Court Case no 1156/2007

⁷²No 2 of 2005

situation against the might of the state institution which seemed interested in the position and had delayed in affirming the regent's appointment.⁷³

The Constitutional Court in *Bhe* did otherwise in a similar situation. It responded to the plea to rule on male primogeniture 'once and for all' and not transfer that to the legislature which at that time had delayed for up to six years since it was first urged to correct the anomaly by the Law Reform Commission.⁷⁴ These two situations show that judges exercise discretion after ascertainment very differently and this is determined by other factors.

This was the situation in the Nigerian case of *Ndadili Mokwa & 11 Ors v Etsu Nupe & 4 Ors*⁷⁵ discussed above under 5.2.1.5. Some Nigerian judges have adopted evidence of indigenous communities that contradict statutes. A judge explained that where there is a statutory law such as the chief's law and the community leads evidence to show that the statute does not reflect their customary practices, he will exercise his discretion against the statutory law in favour of the indigenous practice. Another judge however indicated a reliance on legislations in the belief that the commission of enquiry established to confirm customary norms with respect to the subject of the particular legislation did thoroughly investigate the customary norms before they were adopted in the legislation.

5.2.2.1.4 *Use of witnesses and experts*

In proving the content of customary law, experts have been utilised particularly from the universities or people who have carried out extensive research to explain knotty issues and their testimonies were affirmed by members of the particular community. To determine which version of customary law to accept required the application of the law of evidence. For instance, where two experts explain a customary practice differently, the more probable and convincing version is adopted by the court. The court also endeavoured to observe demeanours, countenance and comportment of witnesses who testified before it. In the South

⁷³ This is risky for situations where there is an attempt at controlling the leadership of the communities by the state actors with respect to the rich mineral resources of the communities within the Province. See Monica de Souza 'Justice and legitimacy hindered by uncertainty: The legal status of traditional councils in North West Province' (2014) available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1991-38772014000200005 (Accessed on 24/10/2016).

⁷⁴ *Bhe* supra paras 13 & 15. It however, transferred some issues on succession to the legislature to deal with.

⁷⁵ Unreported NSHC/MN/144/2001.

African case of *Amantungwa & Ors v Mabuyakhulu*,⁷⁶ the high court rejected the testimony of the respondent's expert on the following grounds – that his knowledge had 'certain limitations ... as far as the Bogosi are concerned'. Also, that he 'labours under the same limitations as a common tribesman' and 'he [had] no certainty about the veracity of his information', that he was obviously biased in his manner and demeanour in favour of the respondent even by conduct. The court observed that he acted more like an attorney for the respondent and was the most active person in court for the respondent from how he counselled the attorney, disputed interpretations by the official interpreter, took advice from persons in court and 'seemed to be the prime adviser of the respondent. The weight given to his evidence was hearsay since he never attended any meeting of the tribe nor the initiation school. The rules of 'probability, credibility and consistency' were applied.⁷⁷

Conflicting expert evidence have been resolved by rejecting the version that is of general application to the broader community as against that for the specific subject community. Credible evidence of traditional leaders of the subject community who are custodians of the customs have also been preferred over those of traditional leaders of neighbouring communities. In the case of *Southon v Moropane*,⁷⁸ there was a joint expert notice in which the experts of the respective parties indicated where they agree and differ. In resolving an area of contradiction central to the case with respect to what constitutes a Pedi customary marriage, the Defendant's expert under cross examination admitted that his research was based on the traditional Pedi marriage conducted in the rural community based on the information he obtained from the elderly people of the community. He admitted that his research did not include how urban people conduct the traditional Pedi marriage which had evolved and adapted to socio-economic changes which the plaintiff's expert witness claimed to testify on. The court resolved in favour of the plaintiff's expert evidence and held that there was a valid customary marriage between the parties. Thus the court accepted the version that specifically related to the parties' circumstance.

⁷⁶NPD Case No. 4023/08.

⁷⁷*Southon v Moropane* (14295/10) [2012] ZAGPJHC 146. See also *Amantungwa & Ors v Mabuyakhulu supra*.

⁷⁸*Supra*. See also the Nigerian case of *Ukeje v Ukeje* Unreported Suit No. LD/184/83 where the court relied on the undisputed evidence of the traditional ruler confirmed by an expert and it held that the customary law disentitling a female and a child born outside wedlock is unconstitutional.

Witnesses from the communities have testified as well as academic experts and local chiefs. Testimonies of persons from the subject communities are confirmed by experts. Experts such as anthropologists, historians, and sociologists have been utilised and even archaeological reports have been used to confirm testimonies of people from the community which would have been simply based on oral history. The courts have looked at the experts' qualifications and experience with respect to determining the weight to accord to their evidence.⁷⁹ There however, have been instances where the court's reliance on the evidence of an expert should be questioned based on the expert's qualification and experience. The judges show a preference for testimonies of the elderly from the community over those of experts.⁸⁰ One of the judges explained that he:

A]lways preferred ... these old men who would explain the nuances of those customs and perhaps give the anthropological background because the problem with the English anthropologists ... they just came with their prejudices ... they judged our customs with foreign parameters, and that's where they got it wrong and so they had to subject our customs to their taste.

This leaning by the judge is geared towards the ascertainment and application of living customary law.

5.2.2.1.5 *Judges' perceptions*

This pertains to the judge's perceptions under different circumstances in Nigeria and South Africa. The judges' opinion with respect to whether or not they exercise judicial discretion in the ascertaining and applying of customary law is not immaterial. While some assert that they do not have discretion, others insist that they do. Where judges believed that they do not have discretion, they have restricted themselves to the evidence before the court and ruled against any party who failed to present sufficient evidence to cover the circumstances of the case. The judges' position was on the ground that there are no gaps in customary law as customary law should cover every circumstance. This was done on the basis

⁷⁹Information from judges' interview. It is worrying that in the case of *Amantungwa & Ors v Mabuyakhulu* supra, the judge accepted the evidence of the plaintiff's expert witness even though he admitted under cross examination of not having any academic publication on the Pedi traditional marriage and particularly on how this is conducted in the townships and cities.

⁸⁰Ibid.

that a judge cannot exercise discretion by supplying what a witness did not supply unless he wants to be examined in the witness box.

A judge in Nigeria explained that he merely applies the customary law proved before him even if it violates the constitution on rights of equality in so far as it is confirmed that it correctly represents the customary law of the people and the Constitution has nothing to do with it. He however admits that his knowledge of customary law is shallow not having really dealt with it until his appointment to an appellate court. While this judge's stance would aid towards the ascertainment and application of living customary law, it would fail Constitutional compliance and a chance to develop same. To this extent, the judge's perception does influence how he ascertains and applies customary law and whether the exercise of his discretion would be in the direction of living customary law.

The college sitting of appellate courts impact on how discretion is utilised. The top two echelons of appeals in both countries sit as a team and the practical experiences of the judges come to bear as they contribute actively to debates from their wealth of experience, research and prior direct in-depth involvement with people subject to customary law such as women's movements. This association with the communities gives insights into the circumstances of poor rural African women and these insights contribute to how discretion is exercised.

5.2.2.1.6 *Constitutional compliance and other considerations*

A high number of judges who exercise discretion in the ascertainment and application of customary law are influenced by the desire to achieve justice, the need to apply the repugnancy clause standard, respect for constitutional rights, and the desire to do that which will be beneficial to the society in both Nigeria and South Africa. Constitutional provisions subject the recognition, application and development of customary law to the bill of rights/fundamental human rights⁸¹ and judges have consciously endeavoured to comply with this.

Hence, some judges, where there are conflicting versions of the content of customary law, would choose that which is more consistent with or more likely to be consistent with the Constitution. The explanation given here for judges of the Constitutional Court in South Africa is

⁸¹ In South African Constitution it is called the bill of rights while in the Nigerian Constitution it is called fundamental human rights.

that based on the Constitution, the judge's primary duty is not to customary law but to the Constitution, and their oath of office supports this. They take into account that Courts must consider the 'spirit, purport and objects of the Bill of Rights' when developing customary law and are conscious that the Country paid a huge price to assert these values.⁸²

One of the judges explained that customary law is not facts but law and where there are conflicting evidence, it should not be treated in the same way facts are weighed against each other but rather, the rules should be identified and that which is more in line with the constitution should be adopted. This position fails to consider that even though customary law is law, this status is based on its own defining features discussed in chapter two, part of which is that it emanates from the community. If this is ignored, it would lead to ascertaining distortions since the rules are identified from the evidence placed before the court which often are in form of facts.

However, the premise for the Constitutional's Court decision in *Shilubana v Mwamitwa*⁸³ seemed to be in line with constitutional values. A strong consideration for the exercise of judicial discretion by the Court in favour of a particular proposition as opposed to a proven practice was the deliberate voluntary evolution of a customary law by the community to conform to constitutional values. In this case, succession to the throne as Hosi practiced by the community was proved and the decision to adopt an evolved position was also explained to the court. The court's decision was whether to confirm the proven customary norm, or accept the voluntarily proven evolution. It considered evidence on the happenings in the village and general meeting of the villages where the decision was made, the opposing parties' view, opinions of counsel, appointment made by the royal council, reports of the development of the law reform commission, the provision of section 9 of the Constitution and the court's independent research. The Court exercised wide discretion here but the legality of its decision is however questioned as going beyond legal standards as discussed under 8.5.3. in chapter eight.

⁸² Based Interview conducted

⁸³ (CCT 03/07/2008) ZACC.

However, the court in the Nigerian case of *Shaba Ndadile & Ors v Etsu Nupe & Ors*⁸⁴ discussed under 5.2.1.5 above rejected the development sought by the plaintiffs' community of their customary law which had begun to be implemented. There was no Constitutional provision for the plaintiffs to rely on to enforce their rights. The comparison between the courts' position in these two cases is discussed in chapter eight.

These considerations for constitutional compliance, achievement of justice and repugnancy test are not restricted to evidence of facts put before the court but apply even to judicial precedent. A judge explains that he would only apply judicial precedents that comply with constitutional standards. When faced with conflicting versions of the applicable customary law, some judges would gravitate towards that which will achieve justice, not conflict with public policy and would not fall short of the repugnancy test. This last consideration is based on the judge's personal perception of what a reasonable person would do.

Other judges however, where the customary law proved does not cover all circumstances, would limit themselves to the evidence before the court and hold that the case has not been proved and would not exercise discretion outside these evidence even for the sake of achieving justice. A judge admits that in such a circumstance, he would 'create' a rule to apply to that particular circumstance in so far as the rule does not fail the repugnancy test. Yet, another judge explained that if the case is framed by the party, i.e. to depict the violation of constitutional rights, he may exercise discretion against the customary rule proved in court if it violates constitutional rights. In other words, where constitutional violation is not raised, the court may ignore it.

There appears to be some form of confusion with respect to ascertaining customary law and subjecting what is ascertained to constitutional and statutory compliance for application, and, accepting versions of customary law that comply with these standards as the ascertained customary law. Where the latter is adopted, the danger is that what is ascertained may be fictitious and that is not what judges are called upon to do.

The court's responsibility is to ascertain customary law as it is and apply same to the case subject to constitutional and statutory compliance which may necessitate developing the

⁸⁴Supra.

ascertained rules for application as was done in *Ukeje v Ukeje & Ors.*⁸⁵ Here, the *Igbo* customary law that disentitles the female child and children born outside wedlock from inheriting from her father's estate on reason of their gender was ascertained by the court from the testimonies of the traditional ruler and an expert which was not contradicted by the plaintiff. However, the court declared the custom as void on the ground that it offends constitutional provisions⁸⁶ that prohibit discrimination on ground of gender and on the circumstances of birth. The court also declared the customary law as repugnant to natural justice, equity and good conscience. This decision was affirmed by the Court of Appeal and the Supreme Court.⁸⁷ The court not only declared as void the *Igbo* customary law that denied a female child and a child born outside wedlock from inheriting from the father's estate, it held that 'no matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from the late father's estate' hence developed it.⁸⁸ Thus, the court first ascertained the customary law, and then subjected it to constitutional standards.

A judge explained that the court is bound by what the litigants state is their custom and cannot subject it to the notions of constitutional standards such as equality but it should be gauged through the limitations of the repugnancy clause. He explained that:

That is the custom of the people and they have accepted it, so it has nothing to do with constitution ... I have come across those cases ... where a woman herself is a property subject to be inherited by the next of kin. If that is what they accept what can you do to them?

The Supreme Court of Appeal case of *Mthembu v Letsela* was decided shortly after the 1996 Constitution came into force. It was sort of a test case of how the provisions of the new Constitutional dispensation would be applied. What the court had to grapple with were first,

⁸⁵ Unreported Suit No.LD/184/83.

⁸⁶ Section 39(1) (a) (2) of the 1979 Nigerian Constitution now section 42(1), (a), (2) 1999 Nigerian constitution.

⁸⁷ Unreported CA/L/ 174 /93 & Suit No SC/224/04.

⁸⁸ Courts in Nigeria have developed customary law such as the decision of the Supreme Court in *Agbai v Okogbue* (1991) 7 NWLR (Pt.204) 391 where the plaintiff challenged the seizure of his implement of trade due to his failure to pay a fine fixed by his age group for the purpose of carrying out development in the community. The court confirmed the existence of grouping into age groups as a customary practice through judicial notice as a 'well-known custom throughout Igbo communities'. It however held that membership must be by choice. ⁸⁸ Justice Nwokedi explained that – 'I do not intend to be understood as holding that the Courts are there to enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its application under existing social environment'. See also IHEME E 'Freedom of association in a Nigerian community - old usages, new rules' (2002) 4.2 IJNPL.

the elevated status of customary law at par with other sources of law and secondly, the application of the values of the new constitution to this distinct source of law. The court relied on old texts and precedents of NAC and did not seek to ascertain living customary law. It upheld the male primogeniture. The Constitutional Court overturned this decision in the *Bhe* case. With better resources and understanding, the Supreme Court of Appeal would decide the case differently.⁸⁹

The sudden elevation of customary law as an independent source of law at the dawn of constitutional democracy, and the thrust on courts to ascertain, apply and where necessary develop them would require some form of activism. That some judges found this to be somewhat initially daunting and were somewhat uneasy since such judicial activism was foreign to the responsibilities of the judge in a civil law country is understandable. They needed some form of guidance which the Constitutional Court provided. The professional pedigree of the judges of the Constitutional Court and their constitutional mandate had prepared them for this. The constitutional court is a composite court of eleven justices and there are a lot of discussions and deliberations by the judges with respect of issues to be determined in a case and this has been useful.

A basic factor that determines why courts develop customary law is to bring it to conformity with constitutional values and, its relevance to the current lived realities of the people who are bound by it, i.e. the broader beneficiaries beyond the parties.⁹⁰ According to Lewis, the development of customary law as explained⁹¹ by the court in the *Mayelane* case suggests a "'process" that takes "the traditions of the community concerned"' into consideration and not a case of 'replacing' one norm with another, which promotes a bottom up approach⁹² which resonates with how customary law is sourced.

A judge states that she will exercise discretion against a proven customary practice in favour of advancements that would achieve justice, such as customary rules that deny the

⁸⁹ Interview conducted.

⁹⁰ *Mayelane v Ngwenyama* supra.

⁹¹ (2010) suit no. SC 235/2004 delivered on 5th March, 2010.

⁹² *Mayelane* para 45. See also *Shilubana v Nwamitwa* 2009 2 SA 66 (CC). See Lewis L 'Judicial "Translation" and contextualisation of values: Rethinking the development of customary law in *Mayelane*' 2015 18.4 PEJ 1131.

paternity of the biological father of a child on the ground that he is yet to pay the dowry of the mother.

The exercise of judicial discretion in the ascertainment and application of customary law is affected by the limitations of repugnancy clauses. According to the Supreme Court in the case of *Ojiogu v Ojiogu*, the argument that the applicable customary law fails the repugnancy test cannot be raised for the first time as a ground of appeal in the appellate court where it is not pleaded in the pleadings at the court a quo. It is interesting to note that the limitations on the ascertainment and application of customary law with respect to the repugnancy doctrine imposed by the earliest pieces of legislation, have been retained in the current legislations in Nigeria and South Africa.⁹³ Section 22 of Proclamation 140 of 1885, which provided that the application of customary law shall be subject to public policy and natural justice, is retained in section 1 of the Law of Evidence Amendment Act and is similar with that applicable in Nigeria. The South African Constitution subjects the validity of customary law to its compatibility with the Constitution and legislation. Hlope J in the case of *Mabuza v Mbatha*⁹⁴ declared that:

The approach whereby African Law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the courts.

The repugnancy provisions of the laws of evidence applicable in both countries fall under this. Rather, constitutional compliance dispenses with the need for the repugnancy test.

In Nigeria, section 18 (3) of the Evidence Act provides that a custom shall not be enforced as law in a judicial proceeding 'if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience'. This limitation is called the repugnancy test or doctrine. Its forbear is found in the colonial era Supreme Court Ordinance of 1914 which precludes any custom that falls short of the standard of natural justice, equity and good

⁹³ For South Africa see Bekker J C *Seymour's Customary Law in Southern Africa* (1989) 5th ed p. See Taiwo E A 'Repugnancy clause and its impact on customary law: comparing the South African and Nigerian positions – some lessons for Nigeria' (2009) 34.1 JJS 110.

⁹⁴ 1939/01 [2002] ZAWCHC 11 para 31.

conscience or conflicts with any local legislation, English laws applicable in Nigeria or 'Indigenous local sanctions'.⁹⁵

Also, section 18(4) of the Evidence Act may be described as the compatibility test. According to the provision, a custom shall not be enforced by courts if it is directly incompatible, or can be implied to be incompatible with any written law in force

Academics have argued that the repugnancy clause should no longer apply as a litmus test in determining whether an ascertained normative practice should be abolished by the court.⁹⁶ Rather, they have advocated for the application of constitutional standards as an alternative. This is especially so for South Africa giving its elevated status. Another ground for this argument is the uncertainty of what really constitutes the repugnancy standards and the fact that they are usually based on Eurocentric concepts or views.⁹⁷ If the constitutional standards would accommodate all considerations for humaneness and justice then the argument to do away with the repugnancy clause is apposite.

In all, it is clear that sometimes the consideration for constitutional compliance, the achievement of justice and the repugnancy and public policy test influence how the judges would exercise discretion in the ascertainment and application of customary law. While some judges see the application of the repugnancy and public policy tests as exercise of discretion, others do not on the ground that they are bound to apply them. Regardless of the judges' opinions, in so far as the standard for the repugnancy and public policy test is not certain,⁹⁸ some form of discretion is exercised by the court. This is especially so where there is an attempt to develop the customary law ascertained. Here, the judge's exercise of discretion becomes influenced by whatever factors the judge puts into consideration in developing the customary law. This also applies to Constitutional standards.

⁹⁵ Malibu C *The Nigerian Legal System* (2005) 119.

⁹⁶ Taiwo op cit note 93. Anifalaje disagrees with Taiwo's position. See Anifalaje J O 'Judicial development of customary law in Nigeria' (1988) 9.1 J.L.H. 40.

⁹⁷ Ibid at 92.

⁹⁸ Taiwo op cit note 93 at 90.

5.2.2.1.7 *Consideration for legal certainty*

Though certainty may not be the central reason for how judges ascertain and apply customary law in Nigeria and South Africa, it does influence some judges' discretion in choosing or maintaining a position. Some judges admit that the need to achieve certainty has influenced them in ascertaining and applying customary law. The circumstances under which they would do these are diverse. First, they would do so to exercise discretion and develop customary law on the issue being considered.⁹⁹ Secondly, if there are uncertainties and both parties disagree on the content of customary law sought to be ascertained and there is a precedent on the matter, the judge would adopt the precedent if it agrees with the evidence of one of the parties for the sake of certainty.¹⁰⁰ Thirdly, if there is uncertainty from the evidence led on the customary norm, the judge would, from the circumstances of the case, take a position in establishing a rule of customary law so the community can have a point of reference with respect to what is expected of them. The judges would therefore consider how the rule would impact the broader society beyond the interest of the parties.¹⁰¹ Fourthly, the judge would adopt the opinion of an expert who testified in the cases even if he is not satisfied with the evidence, for the sake of achieving certainty.

On the other hand, some judges explained that they will not exercise discretion to fill up gaps even for the sake of achieving legal certainty and would simply hold that the party has failed to attain the threshold of proof. Their position is based on the reasoning that the judge should not impose norms on a community and that the only way certainty can be achieved is if the customary norm has been proved before the court.

Though certainty is not particularly a value in customary law,¹⁰² it is relevant in constitutional justice as well as in values of precedent and equality. There is a strain to give consideration to the principles of customary law to ensure harmony and to satisfy parties that due consideration is given to their rights albeit subject to these constitutional values which cannot be ignored. A judge expressed that, in all, the desire to achieve legal certainty and

⁹⁹ Based on interviews conducted.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Himonga C 'African customary law in South Africa – The many faces of *Bhe v Magistrate Khayelitsha*' (2005) RA 178.

ensure that everyone is treated equally ‘militates against just letting living customary law find its way forward. It’s always a difficult balance’.¹⁰³ Hence the approach to the consideration of legal certainty in customary law and constitutional justice is a paradigm clash.

Granted that in the application of certain customary rules, its flexibility is accommodated to give considerations to particular circumstances, it would be erroneous to say that, for instance, there cannot be clear cut rules with respect to certain transactions, such as customary tenancy, succession to chieftainship etc. Parties and amici have sought the development of customary law to create certainty and judges have given consideration for this in endeavouring to ascertain customary law¹⁰⁴ and this is contrary to the very nature of customary law. However, while a few judges have exercised their discretion on the basis of achieving certainty, the majority of those interviewed stated that their ascertainment of customary law in a case will not be compromised on the basis of achieving certainty. The Constitutional Court defended its judgement in the *Bhe* case on the basis that it would achieve certainty in order to protect rights.¹⁰⁵ It however contradicted itself in its defense of its judgement in the *Shilubana* case when it stated that the basis of its decision is that ‘factors relating to legal certainty or the protection of rights’ cannot outweigh a community’s decision to develop its laws.¹⁰⁶

5.2.2.2 Summary

How the substantive factors impact on the ascertainment and application of customary law in both countries depends on how they are applied. For instance, how judges utilise the various methods of ascertainment may enhance or mar the ascertainment and application of living customary law. The same applies to how the judges utilised their prior knowledge of the ascertainment process. The college sitting of the Constitutional Court where judges bring in their diverse experiences and knowledge has its own measure of impact on the process. A

¹⁰³ Interview

¹⁰⁴ Based on interviews conducted. See Himonga ‘The living customary law in African legal system’ in Fenrich, Galizzi & Higgins (eds) op cit note 12 at 54.

¹⁰⁵ *Shilubana* supra note 92 para 76.

¹⁰⁶ *Shilubana* supra para 85.

crucial factor in South Africa is the need to ensure Constitutional compliance has also been a central consideration in the ascertainment process; so also the quest to achieve justice and to comply with the repugnancy and public policy test and consideration for legal certainty. All these indicate varying degrees of discretion exercised by the judges.

5.3 Conclusion

The data utilised in this analysis indicate that judicial discretion has been applied by the formal courts in the ascertainment and application of customary law under the two broad factors – institutional and substantive – and these are basically similar for both Nigeria and South Africa. The institutional factors range from the judges' exposure to customary law which included the content of the judges' training and regulations on the minimal requirements for their appointment, to their grasp of the concept of customary law. Others factors include statutory requirements, protection of the status of statutory law over customary law and the convergence of positivism and pluralism. The substantive factors cover methods of ascertainment utilised by the judges, judges' perception, constitutional compliance and other considerations and consideration for legal certainty.

Judicial discretion was utilised by the higher courts under different circumstances such as where the evidence before the court are not conclusively satisfactory for proving the content of living customary law, where the customary law rules sought to be applied are open textured, and when the court's analysis is based on other considerations outside merely ascertaining customary law such as the desire to achieve justice and constitutional compliance, and the application of the repugnancy and public policy test. It is clear that the higher courts have applied judicial discretion within wide latitude and also influenced by factors intrinsic and extraneous to the legal framework and rules that regulate the processes of its application. The chapter discussed how these factors can aid or impede the ascertainment and application of living customary law by the courts and states that however wide the discretions of a court may be, it should be exercised within the confines of the law to protect rights and it should be based on guiding principles. Where the court embarks on a frolic of its own, its decision will be short of ascertaining and applying living customary law.

Chapter Six

Supplementary factors that influence the ascertainment and application of customary law in courts of superior jurisdiction in Nigeria and South Africa

6.1 Introduction

This chapter seeks to identify factors that influence the exercise of discretion by courts in the ascertainment and application of customary law. The factors identified are intrinsic and extrinsic to the court process. They are derived from a triangulation of data garnered from the interviews conducted with judges and registrars of courts of superior jurisdiction in Nigeria and South Africa, records of proceedings of cases analysed for this purpose and other doctrinal sources such as the applicable laws. While the previous chapter discussed the common factors, this chapter discusses the supplementary factors which include procedural and, socio-economic and political factors which cover a generic range of factors. It is important to mention that the use of the word 'supplementary' does not mean auxiliary. 'Supplementary' as used here simply refers to further factors. I reiterate here that the classifications are based on my own creation based on common features and for the mere reason of enabling an easier discuss. Again, I state that it should be noted that the level or type of court of superior jurisdiction is not a relevant variable for the factors identified because the factors generally apply across the courts. However where there are factors distinct to a particular court type, it will be stated. I restate that it is essential to clarify that this thesis does not claim to have identified all factors possibly present, but merely identified factors that appear glaring to the researcher.

The chapter is also based on the premise extensively discussed in chapter two and states that how discretion is exercised by the judge is determined by factors that enhance or impede the ascertainment of living customary law.

6.2 Supplementary factors

These factors include procedural, socio-economic and political factors.

6.2.1 Procedural factors

These factors are tied to the rules and procedures in the process of ascertaining and applying customary law and include considerations in the resolution of evidential contradictions, the hindrance of technicalities, choice of court process in instituting an action, constraints of appellate courts, accuracy of interpreters and the role of court registrars.

6.2.1.1 *Considerations in the Resolution of evidential contradictions*

The exercise of a judge's discretion in ascertaining and applying customary law in both countries can be affected by how evidential contradictions are resolved and judges have given consideration to a number of factors in resolving these contradictions. Ordinarily, the rules of evidence determine this and where the exercise of evaluation is faulty, it would affect what is ascertained and applied by the court.

Judges have juxtaposed the combination of texts, evidence and precedent to ascertain and apply customary norms when faced with contradictory evidence.¹ A few, in addition to these, utilise research findings of sociologists, anthropologists and historians.² The latter pattern usually is capital intensive and beyond the reach of most litigants. Though not all cases require the latter pattern, in some cases, it would be crucial to a veritable ascertainment and where the parties make these available, the court utilises them.³ Where they are not made available, the courts have either based their verdict within the bounds of the evidence before it, or called for further presentations on the knotty issues.⁴ Though the rules of court permit appellate courts to refer such a matter back to the court a quo to take further evidence, they have seldom done this.⁵ It is difficult to decipher what would have determined the courts' path in these respects.

In resolving evidential contradictions, judges have given priority after evaluation of the evidence put forward by both parties to the version supported by a majority of the witnesses with particular consideration to their status within the community, for instance if they are

¹ *Ukeje v Ukeje* Unreported Suit No.LD/184/83 & Unreported CA/L/ 174 /93 & Suit No SC/224/04.

² *Alexkor v Richtersveld* and *Pilane v Pilane*

³ *Bakgatla Ba Sesfikile Community v Bakgatla Ba Kafela Tribal Authority* Unreported North West High Court Case no. 320/11 (2011).

⁴ *Mayelane v Ngwenyama* supra.

⁵ Interviews conducted.

custodians of the customs. For instance, a change in a customary practice such as one that permits a woman to inherit property will be accepted only if it is proved that a vast majority in the community endorse the change. In Nigeria, where the court is not satisfied with the evidence of both parties, it invites paramount rulers as well as other elders of the communities to verify the rulers' assertions. In order to ensure that credible evidence of customary norms are presented to the court, where paramount rulers are invited to testify in court, they are sometimes warned by the judge to be truthful.

Judges are conscious that in civil cases, they are required to ascertain customary law on the measure of balance of probabilities and not beyond all reasonable doubt and therefore endeavour to apply this standard. The implication is that when ascertaining customary law, they rule in favour of the party in whose favour the scale is tilted however slightly. This may be as a result of evidential principles and not necessarily conclusive that the favoured party's account is authentic and truly representative of the current norms of the community. In the consideration of issues in cases before the courts, courts are bound by the prayers and evidence of the parties before them even though the issues sought to be resolved may require the engagement of additional evidence. In an adversarial system such as that practiced in Nigeria and South Africa, the judges are reluctant to request that the parties supply these additional evidence for fear of being seen as showing an overt interest in the case even though they may give hints in the course of the trial.⁶

Despite the adversarial system, there are instances where the court outrightly would request these additional evidence on the current normative practice of the subject community without which the issues cannot be justifiably resolved, such as in the case of *Mayelane v Ngwenyama and Another*.⁷ In this case, the majority in the Constitutional Court could have restricted itself to the issues before the court and rule that the living customary law was proved. However, it thought it essential to sufficiently confirm the customary rule beyond 'mere assertion' by the person relying on it and her witness, especially since the outcome would invariably apply to members of the broader community.⁸ Therefore, the need to

⁶Interview conducted.

⁷(CCT 57/12) [2013] ZACC 14

⁸Ibid para 47

justifiably resolve the issues in order to attain justice did influence the court in the direction it took to aid the ascertainment and application of customary law even if to do this required going against the rules of procedure and evidence.⁹

No doubt the evidence before the court would be sufficient to get a verdict in favour of the applicant. However, the Constitutional Court's position that such mere assertions are not sufficient to establish a customary rule supports the view that judicial notice based on such assertions are not conclusive proof of a position and must be applied cautiously by the courts. For some judgements, to deviate from a customary rule on which there is judicial precedence, it would take the testimony of a number of people to convince the judges to rule against the precedent.¹⁰

Appellate courts would ordinarily avoid calling for additional evidence in proof of a customary norm. Regarding this as the responsibility of the court a quo, they would rather stick to simply verifying whether the court below, based on the evidence before it, rightly or wrongly ascertained the customary norm. In exceptional cases however, the appellate courts may hear evidence. On appeal, the court relies on the grounds of appeal, briefs of argument and also oral address from the parties. Where the parties fail to raise issues that could aid the ascertainment of customary law, the exercise of the court's discretion may not result in actually ascertaining customary law.

A judge explained that in ascertaining customary law, she would not look at the rules in isolation but would 'look at the parties that are involved, the peculiar facts and circumstance of the case.' For instance is the case of *Nwaigwe & Ors v Okere*¹¹ which commenced at the

⁹Ibid. Paras 111-115.

¹⁰Interviews conducted.

¹¹CC/O/75/88, CCA case no CCA/OW/A/76/9, CA/PH/MISC/17/94&Unreported SC/392/2002. Here, the plaintiffs who are the respondents in the Supreme Court sued for themselves and on behalf of the Umuoheta family of Umuogba and sought a declaration that they are the owners of the land at Umuogba Eziana in accordance with the native law and customs of Umuogba Eziana at Okpala. The plaintiffs led evidence stating their exclusive ownership to the land and how they apportioned land to the defendants as their tenants when they came to their community as was the customary practice and how the defendants have violated the customary rule of tenancy and must vacate the land in accordance to the applicable customary law of which evidence was also led. The plaintiffs had two witnesses -both from within the community -who were one of the plaintiffs and the defendant's 70 year old brother who was also a principal member of the defendant's family who confirmed the plaintiffs' testimony as related to him by his father and the members of their community. His father was the leader of their community. The defendant had two witnesses. Himself and someone from another community. Prior to instituting the matter in court, the plaintiff had sued the defendant before the elders who decided in favour of the plaintiff.

customary court and went through appeals right up to the Supreme Court. The customary court decided in the plaintiffs' favour and affirmed the rule of Umuogba Ezinna customary law put forward by the plaintiff on customary tenancy and the rules for the termination of that tenancy. Under this rule, the defendants were declared as customary tenants of the plaintiff and such tenancy terminated on their violating the grounds for termination. The defendant's brother testified in favour of the plaintiff's right of ownership to the land which was the subject of dispute, and his testimony was accepted by the court. He confirmed the content of Umuogba Ezinna customary law of tenancy and forfeiture put forward by the plaintiff against his own interest and this was a contributory factor in the court's adoption of the plaintiff's version. In evaluating which evidence to adopt, the customary court took this into consideration as well as the fact that the plaintiff's witnesses were from within the community while the defendant's lone witness was from another community. Added to this is also the fact that the elders had decided in the plaintiffs' favour prior to the institution of the action in court.

Judges have, in evaluating evidence, given attention to witnesses' demeanour, consistency under examination in chief and cross examination, the veracity of their evidence and reliability of their source of knowledge.¹² One judge included common sense in this list and explained that even if a customary law is proved to exist, when it does not agree with common sense, it will not be applied. How common sense is measured is uncertain and open to the judge's biases even though another judge asserts that her personal views will not determine what she ascertains since customs are not subject to her personal views.

In the case of *Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle*,¹³ which was on the applicable customary law governing ascendancy to the chieftain of Iragbui, in considering the veracity of the conflicting oral traditional histories before the court, the court held that narrations that agree more with current facts such as features sighted at the *locus in quo* will carry more weight and ruled against the plaintiff. The court's decision was however overturned by the Court of Appeal on the ground that it misconstrued the 'current facts' by reading unnecessary meaning into the evidence before it. The point to this is that in achieving veracity, the court's perception of the facts must also not be misconstrued.

¹² Interviews conducted.

¹³ Unreported suit no. HIK/5/97

The case of *Uwaifo v Uwaifo*¹⁴ illustrates the application of evidential rules by the judge in ascertaining and applying the applicable customary law. In this case, the deceased left a will in which he distributed his estate to his beneficiaries but excluded the plaintiff who was his eldest son, contrary to Bini customary law. The Will's Law¹⁵ subjects the testator's freedom of testamentary disposition to the applicable customary law which provides that the eldest son inherits the *Igiogbe* i.e. the principal house where the deceased lived before his death. In this case, the Plaintiff who is the eldest son of the deceased insisted that the *igiogbe* consist of all the 23 rooms, a vacant land and a big store and that the portion of the will which bequeathed the *igiogbe* to another beneficiary be declared void. Not disputing the rule pertaining to *igiogbe*, the defendants insisted that the estate is in fact two separate properties at numbers 2 and 4 and that only number 4 constitutes the principal house where the deceased lived in his lifetime.

The court held that the concept of *igiogbe* was not the problem. The dispute was whether it was just number 4 or whether it constituted all the properties including the vacant land. Elders who were traditional chiefs from the community testified on behalf of both parties with respect to the content of the customary law. There was also reliance by both parties on judicial precedent by the Supreme Court on the applicable customary law to buttress their respective averments. The court held that the plaintiff's own witness described *igiogbe* as the house where the deceased lived before his death and the plaintiff himself had testified that his father lived in number 4 and this is confirmed by the defendants' witnesses. The deceased himself made specific reference to number 4 in his will as the house he lived, in which he devised to his second son, Henry, whom he appointed as the head of his estate.

In determining what weight the evidence should carry, the judge accepted the evidence of the plaintiff's second witness over that of his third witness who said the *igiogbe* constituted all the houses in the compound because the second witness knew the premises and described it with precision while the third witness did not. The judge painstakingly pointed out distinctions between the respective averments by both parties and the judicial authorities they cited to support their respective assertions and made its conclusion. The court therefore held that the

¹⁴Unreported suit no.B/570/90.

¹⁵Section 3 (1) Cap 72, Laws of Bendel State of Nigeria 1976.

igiogbe consisted of only number 4 and voided the particular provision of the will that bequeathed the property to the second son in line with the accepted practice in the community. The judgement was affirmed by both the Court of Appeal and the Supreme Court.¹⁶ The glaring factor that features here is the judges' ability to apply evidential rules to the circumstances and facts of the case and what was put into consideration in the ascertainment and application of the content of the applicable customary law.

The judge's adroitness in the rules of Evidence does aid in how discretion is exercised in the process of ascertainment and is a vital factor. The case of *Iorshashe V Ugbu & Anor*¹⁷ is a good illustration of this. Here, the content of the Tiv customary law of succession was pleaded and evidence was led by the people within the Tiv community, and their leaders and king makers testified. Texts which supported the plaintiff's case were utilised. All parties were agreed on the general principle of succession which is *yanawaangbain*¹⁸ but disagreed on the point that it was not strictly applied and there could be circumstances that would justify a deviation from the rule as in the case of the plaintiff's appointment. The court decided, after some engagement in analysis grounded on the applicable rules of evidence, in favour of the plaintiff based on his testimony as well as those of his witnesses. The plaintiff's position was also invariably confirmed by some of the defendants' witnesses corroborated by documents relied upon as well as the circumstances of the case. The judge could achieve this because he was conversant with the rules of evidence.

For some judges, testimonies of elders well advanced in age will be considered even above a text written by a professor who has researched in the field because the elders should know best, and at that age, it is expected that such persons, except if they are 'inveterate liars' would be preparing to meet their God and would be more likely to tell the truth.¹⁹ Another judge explained that in order to check the authenticity of a testimony, he would ask further questions for clarity such as the level of the witness' exposure to the community whose

¹⁶(2005) 3 NWLR (Part 913) 479 and (2013) 10 NWLR (Pt. 1361) 185.

¹⁷ FCT/CCA/CVA/4/2012

¹⁸ Which is a principle of rotational opportunity between the *Ipusuu* and *Ichungo* who must take turns to rule.

¹⁹ Based on the interview conducted.

customary norm he is testifying on. A judge explained that he felt more at home with testimonies from elderly men:

So if we call the oldest man, he will ... explain the anthropological factors that prompted the emergence of these customs. A foreigner coming to interrogate such a custom would not understand the underlying rationale for the evolution of such a custom ... the living testimony of those who are aware of the custom. I am dealing with the current... living testimony of people, I will prefer of course the evidence of people who are before me.

If at the close of a case the court is still uncertain that the customary law has been proved, judges react differently. While some would attempt to fill up the gap in different ways described in the third paragraph under 5.2.2.1.6, others would strike out or non-suit the case or decide against the party relying on the particular custom.

The courts have utilised evidence in previous cases to determine the veracity of evidence in cases before them. Sometimes this is done erroneously, while at other times it is done within the parameters of what is prescribed by the rules. Such was the situation in *Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle*²⁰ In this case, the court erroneously relied on a document and evidence in a different case on the same subject matter as the main ground for discounting the oral traditional evidence in favour of the plaintiff. The witness who testified in the earlier case and the document were not before the present court and were not verified and cross examined. The Court of Appeal held that though inference could be made from them, the court a quo could not rely on them as the main reason for discountenancing the plaintiff's evidence. This analysis by the court reveals the judge's adroit evidential considerations. This case is distinguished from *Mahionu Aduku & Anor v Danjuma Achor & Anor*.²¹ Here, the plaintiffs challenged the appointment of the defendant as the Ohioga Okete and averred that under their customary law, a conviction as a thief is a disqualification for appointment to the Ohioga Okete clan stool. The *Attah* of Igala (chief of all Igalas), as the 2nd defendant, contradicted this averment. The court relied on the *Attah's* averment in an earlier suit²² where he stated the above as the correct position in the applicable customary law which

²⁰Supra.

²¹Unreported AYHC/7/2001 Kogi State High Court.

²² Unreported CR/84/91 of 15/7/94.

was a contradiction to his testimony before the current court. The court also relied on an earlier judgment in a different case in which the judge held that the *Attah* 'elevates his personal preference over and above Igala native law and custom where there is conflict between the two on any issue'. The trial court therefore rejected the veracity of the *Attah*'s testimony on the content of the applicable customary law and upheld the plaintiff's position corroborated by the oldest man in the community.

The distinction between the two cases is that the *Attah* was before the court and was given an opportunity to respond to the issues in his earlier averments.²³ At the Court of Appeal, however, the decision of the trial court was reversed. The Court of Appeal strangely chose to rely on the *Attah*'s testimony that under the Igala custom, since the plaintiff had been removed from the stool in his lifetime and, none of his descendants can have any say with respect to the stool. On this basis, the Court of Appeal rejected the plaintiff's averments on the ground that under the applicable customary law, the plaintiff was not in a position to have a say with respect to the stool and therefore lacked locus standi in the case. It is interesting to note that the court utilised what might be the customary law process of ascertainment which is that under the applicable customary law, the plaintiffs have no say in asserting any position with respect to the stool.²⁴ Unfortunately however, the lower court's analysis seemed more probable of the content of the customary law.

The courts have also affirmed customary norms put forward by a party where it is not disputed. In *Temile & Ors v Awani*,²⁵ the high court held that though the plaintiff did not lead evidence in support of the Itsekiri native law and custom which he relied upon, because its content was not disputed, and having found the account of events made by the plaintiff to be proved, it held in favour of the plaintiff. The defendants appealed against this judgment on the ground that the plaintiff did not prove his case and also failed to prove the content of Itsekiri customary law (on the 'validity and exclusivity' of the gift of land which is the subject matter in

²³ The Court of Appeal however reversed the judgement of the high court on the grounds that the plaintiff lack locus standi to institute the case and that there was no plaintiff before the court since no application was brought to replace the plaintiff after his death, and that he lacked the locus standi to bring file the suit. CA/A/67/05.

²⁴ As discussed in paragraphs four and five under 4.2.1. in chapter four.

²⁵ Unreported W/23/84, CA/B/36/91, SC/79/96. At the high court, the case was *Awani v Awani*. The name was changed at the demise of the defendant who was replaced by another member of the family.

the case) and that the plaintiff's case ought to stand on its strength and not based on the loopholes in the defendant's case. Both the Court of Appeal and the Supreme Court upheld the decision of the high court and stated that Itsekiri native law and custom was actually pleaded and sufficiently supported with testimonies which were not refuted by the defendants. In this case, though the court a quo's decision was in favour of the plaintiff, it erroneously held that the plaintiff did not lead evidence to prove the content of the customary law. The appellate courts rectified this error. The point being made here, however, is that the court a quo ruled in favour of the plaintiff's assertions believing that no evidence was put before the court but on the premise that it was not disputed. The basis for the court a quo's decision was erroneous and what it reveals is that courts could ascertain and apply customary law on mistaken grounds.

For customary law to be applied in court, it must be proved irrespective of whether it is disputed or not. The customary court of appeal set aside the decision of the customary court granting divorce and full custody of the children of the marriage to the petitioner in the case of *Emenalo Omi v Chinwe Emenalo*.²⁶ The decision of the appeal court was on the basis that although the petitioner's assertions on the validity of her marriage and circumstances that led to her applying for divorce and custody of the children were uncontroverted, she failed to lead evidence on the Igbo customary law of marriage, divorce and custody upon which to base the judgement of the customary court and this responsibility is on the party that asserts.

Despite the presentation of evidence by the parties of the content of the applicable customary law, the courts may exercise discretion by choosing to dwell more on other issues that would produce the same result as that sought to be enforced under the applicable customary law. The court may therefore consider it superfluous to ascertain the customary law for application. The reason for not ascertaining the customary law already in evidence before the court may be tied to the court's erroneous understanding of the rules of court. Both situations played out in the case of *Mayelane v Ngwenyama*²⁷ where the court a quo based its judgment on the interpretation of the 7(6) of the Recognition Act and ignored ascertaining the applicable customary law on the prerequisite of consent of the first wife to the validity of a subsequent marriage of the husband based on evidence already before it. The Supreme Court

²⁶FCT /CCA/CVA/16/2010

²⁷Supra.

of Appeal on the other hand erroneously held that it could not ascertain and apply the applicable customary law even from the evidence presented at the high court because there was no cross appeal before it on the issue, but rather considered section 7 (6) of the Recognition of Customary Marriages Act.²⁸ On appeal, the Constitutional Court, in my view, correctly held that it did not require a cross appeal to do that. By dwelling on other alternative routes, the high court and Supreme Court of Appeal failed to ascertain the content of the applicable customary law which formed the crux of the case.

Again, the Supreme Court of Appeal showed a lack of clear understanding of the statutory requirement of a valid customary marriage in s 3 (1) (b) when it held that the requirement of celebrating a marriage in accordance with the applicable customary law was fulfilled without ascertaining whether the consent of a first wife was a requirement for a valid subsequent marriage in the particular custom. Section 3 (1) (b) provides that 'the marriages must be negotiated and entered into or celebrated in accordance with customary law.' It ought to have first ascertained the content of the law on whether or not consent is required before determining whether the requirement was met. The court also held that the intention of the drafters of the Recognition of Customary Marriages Act could not have been to alter customary law by subjecting polygyny to consent. There was no way it could have deciphered this intention when the Act did not provide for the content of the applicable customary law. This decision was therefore based on assumptions that consent was not a requirement under customary law and the said section 3 (1) (b) was abstractly determined by the court.

The courts may refrain from ascertaining and applying the applicable customary law despite the evidence before it if it finds an easy way out that addresses the issues. This is indicated in the case of the *Segwagwa Mamogale v Premier North West Province*²⁹ where the judge did not seek to ascertain the applicable customary law procedure for the appointment and removal of a regent, but granted the application of the applicant nullifying his removal and the appointment of the 2nd respondent as regent by the Premier. This was on the ground that it

²⁸ Which provides that 'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages'.

²⁹ Unreported North West High Court Case no 227/2005.

violated the provisions of the bill of rights, the Promotion of Administrative Justice Act³⁰ and the Bophuthatswana Traditional Authorities Act³¹ because the applicant was not given a right to fair hearing. Even though the applicant relied on these laws in his application, it was a major part of this contention that the procedure adopted by the Premier went contrary to customary law procedures and evidence was led by both parties on their respective position. These laws provided for the application of customary in such removal and the ascertainment of the applicable customary law was crucial to the determination of the case but the court did not ascertain the relevant customary law because it found an easier way out. Fortunately, the applicant's right was not adversely affected by the court's omission.

The exercise of discretion in ascertaining and applying customary law by the court may not be based on the strict application of the rules of evidence but on what the court deems as the best way to determine the content of the applicable customary law. The three differing judgements in the case of *Mayelane v Ngwenyama and Anor*³² in the Constitutional Court is a good example of the exercise of a judge's discretion in ascertaining and applying customary law. This is despite the fact that all the judgements made similar orders by holding that the purported marriage of the respondent to the deceased was invalid having been conducted contrary to the applicable customary norm that required consent. The second and third judgements differed from the majority judgment on the ground that it was not necessary for the Constitutional Court to develop the Tsonga customary law of marriage after it was ascertained. It could have based its judgement on the evidence presented at the high court where the content of the Tsonga customary marriage asserted by the appellant was not controverted by the respondent.³³ Rather, it requested further evidence to satisfactorily confirm the content of the law since the outcome of the case would apply to the broader community.

Parties have been known to introduce a ground to their cases for the first time on appeal thereby not giving the earlier courts the opportunity to consider the issues canvassed.

³⁰No. 3 of 2000.

³¹No. 23 of 1978.

³²(CCT 57/12) [2013].

³³While the main judgment referred to conflicts in the affidavit evidence submitted in response to the court's direction for further evidence as 'nuances and perspectives', the 2nd judgment (dissenting) asserts that there indeed were contradictions. Para 60.

Generally, parties are not supposed to raise new points of law for the first time on appeal but the Constitutional Court has explained that ‘it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues.’³⁴ In the case of *Mayelane v Ngwenyama and Another*³⁵ however, new facts were introduced by the respondent who took advantage of the court’s direction for further evidence on the content of the applicable customary law. This opening in the law aided a more thorough ascertainment process adopted by the court.

There are also instances where judges may not be well versed in the concept and values of customary law but may generally seek to do equity in the cases before them and this will influence what they apply. This is the position of one of the judges interviewed with no prior experience in customary law before his appointment to the bench. He admits that one way or the other, his concept of equity would rub off on his application of customary law rules.

Another judge would look for what would ultimately benefit the larger community. She states:

I think we mustn’t create too much of a fetish about it. Legal rules are not magic. They are tools for the service of human beings, and human beings remain the primary beneficiaries of those rules.

In all, different evidential considerations give rise to how judges exercise their discretion in the ascertainment and application of customary law and these are testaments to the fact that judges do exercise discretion and often in a wide manner. Whether or not these lead to the ascertainment of living customary law is dependent on the circumstances of the case, how judges apply the rules of evidence and other factors.

6.2.1.2 *The hindrance of technicalities*

A factor that impedes an appellate court from having a say on whether customary law was properly ascertained and applied at the court a quo pertains to the ground of appeal. In

³⁴See *Richsterveld’s case supra*. See also *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* paras 50 & 51. And *Shilubana v Nmamitwa Supra* where the first appellant who had relied on s. 9 of the Constitution in the high court, introduced s. 12 at the Supreme Court of Appeal for the first time and therefore did not give the court a quo the chance to consider this point of law.

³⁵*Supra*.

such an instance, the ground of appeal may be on technical points of law which though not directly related to the ascertained customary law, are central to the appeal. The determination of such technical ground invariably leads to upholding or reversing the judgement of the lower court which includes what was ascertained even where the appellate court does not consider the customary law ascertained because it was not a ground of appeal.

6.2.1.3 *Choice of court process in instituting an action*

One factor that influences how a judge exercises discretion in the process of ascertaining customary law in South Africa is interestingly tied to the court process utilised in instituting the case. This is whether by way of a motion application where affidavits are filed which dispense with the need for oral evidence or through a process which accommodates pleadings and oral evidence. Litigants may prefer motion application because it is speedier. However, the parties may not have the chance to present sufficient evidence to prove the content of the customary law before the court. The court may consequently be compelled to make a decision based on insufficient evidence which could be decided otherwise if more evidence were before the court. The case of *Bakgatla Ba Sesfikile Community v Bakgatla Ba Kafela Tribal Authority*³⁶ clearly illustrates this. Here, the applicants claimed exclusive right to a farm which, according to them, was held on their behalf by the traditional ruler of a broader community which they belong to. They claimed that this information was passed down to them through oral history and had a document with the names of their predecessors who paid the purchase price. Their claim was based on the proof of a customary law practice that entitled them as a sub- group to purchase and own lands even without proof of possession. The court held that the applicants failed to prove their claim and admitted that the issues to be determined could not be resolved on affidavit evidence. It held that the applicants 'should have realised that there are or might be serious dispute of facts' that would require further evidence.³⁷ The court therefore rejected the applicant's account of the content of the applicable customary law on the ground that the evidence before the court was insufficient to establish the customary practice.

³⁶Unreported North West High Court Case no. 320/11.

³⁷Supra para 38.

In the case of *Pilane v Pilane*³⁸ the court had only affidavit evidence to consider due to the process adopted by the applicant to commence the action. No oral evidence could be taken to resolve the contradictions in the affidavit evidence with respect to the contents of the applicable customary law on the appropriate person to convene a village meeting to hold the community leadership accountable. The judge at the court a quo therefore sought to apply the Plascon-Evans rule.³⁹ This rule states that where there are factual disputes, the applicants' relief will only be granted if his admitted facts and the respondent's position justify it. The court a quo ruled in favour of the applicant but was overturned by the Constitutional Court on the ground that it applied the Plascon-Evans rule wrongly. The basis for this was that the respondents' uncontradicted accounts backed by expert evidence refuted the applicant's version in their founding affidavit. This was clearly a technical application of the rules of evidence upon which the discretion of the court was exercised in an attempt to ascertain the applicable customary law. It is common cause that wrong application of the rules of evidence occasion error in the decision of the courts, and the process of ascertainment and application of customary law is no exception.

6.2.1.4 *Constraints of appellate courts*

Appellate courts do not have the opportunity to study the demeanour of the witnesses who testify in court in order to determine the veracity of their testimonies by observing their demeanour, character and behavioural pattern. These contribute to the determination of the credibility of the evidence given for the ascertainment of customary law in the court. Since appellate courts can overturn the decisions of the court a quo, they may not be in a position to fully appreciate the reason behind the decision of the judge at the court a quo who had the privilege to not only consider the evidence before him, but to observe the demeanour and mannerisms of the witnesses.

³⁸(CCT 46/12) [2013] ZACC 3.

³⁹ Based on the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 620 (AD). This rule is applicable only if the applicant had requested that vital dispute of fact be referred for oral evidence for its resolution but the request was refused.

6.2.1.5 *Accuracy of interpreters*

One of the challenges identified at the customary court of appeal that would affect the ascertainment and application of customary law by the court is with respect to the services of interpreters in the court as well as in the customary courts from where appeals come to the court. The court has not engaged professional interpreters but utilises people with secondary level education who speak passable English and some local languages restricted to Gbagyi, Hausa and Bassa. The court also uses volunteers as interpreters such as a lady versed in a number of languages who offers her services for free in one of the customary courts within its jurisdiction. It is in doubtful whether the interpretation done by these people is accurate and this can work against accurate ascertainment, as witnesses may not really understand questions put to them in the court and their responses may not be correctly relayed to the court. For instance, one registrar explained that:

Sometimes when we are sitting here, the judges most especially Justice [X], because [he/she] is very versed in Hausa, when somebody(interpreter) is translating, ...[he/she] says ... but that is not what the guy is saying. That is not what he is saying ... so why is he saying something else.

This is also a challenge in South African courts. In the case of *Southon v Moropane*,⁴⁰ the court cautioned the interpreter not to testify but simply interpret the plaintiff's witness' testimony crucial to the plaintiff's case with respect to how her customary marriage was conducted. The interpreter was cautioned about three times by the judge for both misinterpreting the question put to the witness and relating the witnesses' response. Had the judge not been well versed in the local language, the error of the interpreter would not have been discovered and the ascertainment and application by the court could have been affected by this error. It is vital to note that this factor applies in courts that hear evidence as well and not in solely appellate courts.

6.2.1.6 *The role of court registrars*

Though registrars are not directly involved in the process of ascertainment in court, they play certain vital roles in the administration that could make credible evidence accessible to the

⁴⁰Ibid.

court to enhance a prudent exercise of discretion in the ascertainment and application of customary law. The roles they play do not necessarily require legal qualification. Their experience in customary law prior to their appointment and thereafter, range from none to extensive. Though the responsibilities of court registrars is administrative, their roles may affect the process of ascertainment of customary law by the courts when it pertains to requesting for witnesses to testify in court which on the order of the judge sometimes come within their purview. Their background and professional experience with respect to customary law range from almost none to extensive.

The rules of court permit further evidence, e.g. expert evidence to be obtained in exceptional circumstances for the court at the instance of either the court or the parties to the case. This is if the additional evidence will affect the determination of the appeal and will cause 'a miscarriage of justice' where the new evidence is not brought in.⁴¹ The acceptance of further evidence to aid the ascertainment and application of customary law is accommodated under the provision of the Court of Appeal Act which confers general powers on the court 'to do all such things in the utmost interest of justice'.⁴²

In South Africa, where the court is dissatisfied with the evidence on the content of the applicable customary law before it, and opts to invite amici to address it on the related issue,⁴³ the registrar's role will be to simply convey the decision of the court to the amici. Except where the court specifically requests a particular amicus, the registrars would have to scout for organizations and groups that could act as amici; this could be done through the internet and by contacting cultural groups, institutions that promote such, provincial bars and the Human Rights Council for suggestions. Newspapers and law journals for possible persons or organisations who could act as amici are also checked. It is crucial who is invited and where the registrar understands this and the requisite persons are invited, the contribution may impact on the courts' discretion with respect to what the amici brings to the case.

⁴¹For instance, Order 4 rule 2 Court of Appeal Rules 2011. Order 1 rule 12 (1) Supreme Court Rules Nigeria 1999. See rules 20 (1) (c) (v) Rules of the Constitutional Court no. R. 1675 of 2003.

⁴²Order 16.

⁴³ Rather than request for further grounds of appeal or refer the matter to the trial court for further evidence to be obtained for appellate courts.

In Nigeria, irrespective of who makes the request for expert evidence, the parties ordinarily supply the names of the experts to be invited, but there are instances where this is left in the registrar's purview. The registrars would, when required by an order of the court, confirm the status of who is being invited as an expert. For instance, if the court specifically requested for a high chief or a principal member of the community, the registrar would confirm to ensure the status of who is brought.

The registrar, on the instruction of the judge, issues a letter of invitation to an expert identified by either the parties or a community association of the particular customary law in issue. Some of the heterogeneous communities' resident in Abuja have each established their respective community associations guided by their respective customary laws. The customary court of Appeal in Abuja has never had to request for an expert witness from the villages of origin of the communities but have instead, utilised the custodians of these customs in these community associations. A good example is the case of *Iorshashe V Ugbu & Anor*⁴⁴ where the elders of the community who testified on the contents of Tiv customary law of succession and the concept of *yanawaanngbin*—a rule of succession – came from the community within the Federal Capital Territory and not from the State of origin.⁴⁵

The experts invited have always honoured the invitation though they are not paid but are given just stipends by the court to barely cover their transportation and in some cases, inconveniences. Where the experts are requested by the parties, the parties are left to cater for the cost of bringing them. However, where the party is not able to bear the financial cost, they may make a special application to the court for assistance which may not be successful because of the fear of the being viewed as favouring one party against the other. Therefore, the efficacy of the registrar in identifying community association, confirming the status of the witnesses invited, and the court's financial assistance to witnesses invited by the parties could directly or indirect affect the ascertainment process. The underlying aim is to ensure that credible evidence of living customary law is put before the court while it exercises its discretion in the ascertainment process.

⁴⁴FCT/CCA/CVA/4/2012.

⁴⁵ Though in this case, the registry had no hand in bringing them to court. They came as a result of the parties' arrangement.

6.2.1.7 *Summary*

There are many factors the courts put into consideration in resolving evidential contradictions in the course of ascertaining and applying customary law and these cover a wide range. This reveals that a great deal of discretion is exercised by the court and is in certain instances, misapplied, i.e. applied outside the purview of the rules and principles of evidence, while in other instances they are utilised within the purview of the rules and principles of evidence. Other procedural factors such as the hindrance of technicalities, choice of court process in instituting an action and constraints of appellate courts emanate from the applicable rules of court but still affect the ascertainment and application of customary law either directly or indirectly. The accuracy of interpreters and the role of court registrars also contribute to what is put before the court for ascertainment. In all, the exercise of discretion by the judge in ascertaining and applying customary law is influenced by how these factors play out based on the discussion above.

6.2.2 *Socio-economic and political factors*

These factors cover the range of judges' ideology and experience, transformation agenda and Constitutional mandate, inability to afford legal representation and incompetence of counsel, and the impact of the participation of non-governmental organizations and government commissions on the courts' decisions. These are discussed below.

6.2.2.1 *Judges' ideology and experience*

Judges have applied discretion to protect vulnerable rights and in particular, women's rights. Such judges were influenced by a number of factors such as the profound impact of the knowledge of the historical background on the plight of the African widows. The basis for this is their vulnerability and their being viewed as the least protected under statist laws which includes distorted versions of customary law mainly for the benefit of the colonial and eventually the Apartheid government (for South Africa).

In South Africa, one of the judges interviewed talked extensively of his socialist ideology and revolutionary activities centred on nation building and the promotion of central principles

of the constitution focused on equal treatment of genders and social hierarchies. According to him, these define how he views customary law and influence how he exercises discretion in the ascertainment and application of customary law. In addition is his close observation of the negotiations at Kempton Park that involved the active participation of women's groups who insisted on the recognition of customary law subject to the bill of rights. According to him, people did play an active role in defining how they want to be governed and the recognition accorded customary law by the Constitution reflects their desire and he would not overlook that in ascertaining and applying customary law to cases before him.

For the most part, there was little indication that male judges would rule differently from their female colleagues on gender issues simply on ground of their gender. The observed indication towards the protection of the rights of women and children is knowledge and experience of the plight of women irrespective of the gender of the judge. The decisions against male primogeniture in the case of *Ukeje v Ukeje* at the Nigerian Supreme Court and the *Bhe* case at the South African Constitutional Court were endorsed by both male and female judges. However, for some female judges in one of the apex courts, the decision against male primogeniture was particularly significant. Having worked very closely with rural women who have suffered similar plights, they understood their challenges. Their position was also stirred by 'the fear that in fact the promise of the Constitution would not live for women across [the country] if we didn't make a very clear statement, that this rule is absolutely not acceptable.'⁴⁶ When questioned about male primogeniture, a Nigerian female judge looking indignant responded emotionally:

How dare you now start to quote custom when there is glaring evidence that these two jointly put funds together... I still find it repugnant to endorse the view that a stranger who had nothing whatsoever to do with the property is now coming up to say that he is the sole beneficiary.

She admitted that as a female judge who feels as a woman, the tendency to refrain from sanctioning a custom where a widow is deprived of her husband's property is present. It is also interesting to note that a male judge, when asked the same question, stated sarcastically that

⁴⁶Based on interview conducted. The quotation was made by one of them.

he sees nothing wrong with the principle of male primogeniture and would endorse such customary practice if satisfactorily proved before him regardless of the equality rights in the Constitution. It is uncertain if his views are tied to his gender. For whatever reason, it is worthy to note that the cases of *Ukeje v Ukeje & Ors*^a which overruled male primogeniture, and *Obusez v Obusez* were heard at the court a quo by female judges. In the latter case, the judge applied the Lagos State Administration of Justice Law which prescribed the widow and her children as the heirs of the deceased estate as against the applicable customary law which excludes the widow. Also the lead judgement in the Supreme Court case of *Anekwe v Nwekwe*⁴⁷ which upheld the judgements of the Court of Appeal and lower courts annulling the male primogeniture rule was written by a female judge who prescribed punitive measures against anyone seeking to implement the male primogeniture rule.

6.2.2.2 Transformation agenda and constitutional mandate

The transformation agenda being effected by the South African State is a vital consideration in the appointment of judges, particularly to the Constitutional Court, and its impact cannot be ignored in the judges output in the exercise of discretion.⁴⁸ The judges are conscious of the need to reflect this in the adjudicatory duties. One of the judges explained that:

[T]he whole court was open to this dynamic way of looking at law in our new country because it was an old country trying to become a new country and it required fresh ways of thinking about everything not just about customary law, but fresh ways of thinking about land and land law.

While in almost all the customary law cases heard in the Constitutional Court, most normative practices of particular communities were developed to accommodate constitutional values, the normative practices of some communities and the rights that ensue from them have also been upheld even as being in line with constitutional values.⁴⁹ The courts, particularly the Constitutional Court, are mindful of the commitment to the transformation of the society from the injustices of the past to the achievement of equality and the advancement of human rights

⁴⁷(2014) LPELR-22697(SC).

⁴⁸Based on empirical data obtained.

⁴⁹ Such as in the cases of *Pilane v Pilane* supra and *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003]

and freedom.⁵⁰ Therefore, there is a commitment to correct the past experiences of injustice and the goal of adopting corrective measures to achieve equality and dignity. This is coupled with the constitutional obligation to apply and develop customary law and these may have influenced the Constitutional Court's approach in ascertaining and applying customary law which has struggled between its recognition as an independent source of law and constitutional compliance. This may explain its strident steps towards ensuring constitutional compliance in the cases it has heard, a step which the Nigerian courts have taken cautiously.

6.2.2.3 *Inability to afford legal representation and incompetence of counsel*

This factor was not identified in the cases in the superior courts in South Africa. Legal practitioners have a right of audience in all courts of law in Nigeria which includes the customary court. Appeals to the customary court of appeal emanate from the customary courts which are mainly patronised by people from the grass roots who may not necessarily afford legal representations. Therefore, it is not uncommon to sometimes find a litigant with no legal representation.

Where there is legal representation on only one side, the other party is placed at a disadvantage even with respect to ascertainment of customary law. Such a litigant would not know the rules of evidence which are crucial to the judge's assessment and determination of evidence since the judges are trained under Eurocentric curriculum and may not diffuse its influence in their duties as judges. In particular, such a litigant may not know what exactly should be put before the court, or carefully articulate his/her evidence in a manner that would clearly present his/her position. The litigant would not be a match for the expertise of the lawyer on the other side who would articulately present the case of his/her client in ways that would influence a favourable outcome which would include the ascertainment of the applicable customary law in the case.

⁵⁰ 'Accordingly, it would seem that South African constitutionalism attempts to transform ... society from one deeply divided by the legacy of a racist and unequal past, into one based on democracy, social justice, equality, dignity and freedom'. See Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' SA Publiekreg = SA Public Law, Volume 20, Issue 1, Jan 2005, p. 155 – 166 at 158.

In the case of *Rifkat Dogo v Yuan Musa*⁵¹, the plaintiff, a woman, with no understanding of the English language, a farmer and married with eight children had no legal representation at the customary court. She was no match for the defendant's counsel and had no legal knowledge in the act of advocacy or the ability to know what should be proved in a court of law. She did not re-examine her witnesses even when there was need to do so and her cross-examination was very shallow. The court gave judgement against her. She appealed against the whole judgement which included the decision on the content of the applicable customary law on the ground that the judge relied on evidence that was not presented, and was based on 'speculations and conjectures of customs'. On appeal, she engaged the services of a lawyer who applied for leave to appeal out of time but gave no reason for the delay and the matter was struck out on that ground. Even though the grounds of appeal were very cogent, it is a rather unfortunate case where the appellant never had the chance to present her case for reconsideration of the customary law ascertained and applied by the court below. The appellate court did not have the chance to review the judgement, hence the distortions supposedly ascertained and applied by the court below remained in force. This case contrast with the case of *Nwaigwe & Ors v Okere*⁵² which commenced from the customary court and went all the way to the Supreme Court. All through, both parties had legal representation and the systematic presentation of each party's evidence with respect to the content of the applicable customary law were matched. Therefore, the ascertainment of the applicable customary law was not jeopardised due to inadvertence resulting from lack of legal representation.

Another case on this point is the case of *Adamu Garba v Dorcas Adamu*.⁵³ Though at the customary court neither party had legal representation, the appellant had no legal representation at the customary court of appeal while the respondent did. The court advised that he engage the services of a legal practitioner but he declined saying that he could conduct the appeal on his own. No brief of argument was filed. The respondent also submitted no brief of argument. The ground of appeal was his dissatisfaction with the judgement of the lower

⁵¹Unreported CCA/CVA/9/2011.

⁵²Unreported SC/392/2002.

⁵³Unreported FCT/CCA/CVA/25/2013.

court granting divorce without a refund of his dowry which is contrary to Gbagyi native law and custom. The appellant argued that the court determined the case based on Yangoji native law and custom which was not applicable to the case and is often mistaken to be the same as the Gbagyi native law and custom.

The court upheld the decision of the customary court confirming the customary rule ascertained on the appellant's failure to show evidence that there is indeed a distinction between Gbagyi and Yangoji customary law. Despite the court's assistance in the formulation of issues for determination, the respondent failed to properly articulate his position before the court which was the basis of its decision with respect to the customary law ascertained and applied in the case at the lower court.

With respect to incompetence of counsel is the case of *Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle*⁵⁴ where the judgement of the court a quo in the ascertainment and application of the applicable customary law had many loopholes. The appellant's counsel on appeal filed a lone ground of appeal and a two paged brief of argument leaving out several issues that should be addressed. Fortunately, the appellant replaced his counsel and engaged the services of another law firm which filed ten additional grounds of appeal and well-articulated particulars of argument and submitted a very comprehensive appellant's brief of argument of over 40 pages. Without calling further evidence, he utilised the evidence at the trial court and articulately made a very clear explanation of the issues. The change in counsel and the expertise and meticulous engagement with the case gave the appellant the chance of properly presenting his case before the Court of Appeal and addressed evidential weight to be attached to the plaintiffs' evidence on the content of the applicable customary law. The Court of Appeal ruled in the plaintiff's favour. Thus, the engagement of a competent counsel can enhance the ascertainment of living customary law.

In the case of *Audu Adamu Huri & Ors v Shuaibu Ismaila*⁵⁵ the court greatly criticised the counsel of the appellant for incompetence. The appellant did not have the chance to have the judgment of the court reviewed and had to live with the supposed ascertainment of the Bassa customary law on the paternity of a child carried out by the court a quo. The appellant claimed

⁵⁴Unreported CA/I/118/99.

⁵⁵Unreported CCA/CVA/10/2007.

that no customary law was proved to entitle the plaintiff/respondent to the paternity of the child but did not get the chance to make his case due to the incompetence of his counsel.

6.2.2.4 *The impact of the participation of non-governmental organizations and government commissions on the courts' decisions*

So far, the role of non-governmental organizations and government commissions either as amici or as counsel representing the parties and even as litigants in some instances have had tremendous impact on the court with respect to the ascertainment and application of customary law. Amici get involved in such cases either through invitations by the court or through media publicity by journalists who regularly monitor the courts to see the cases filed. The journalists publicise such cases and interested amici apply to the court to be joined. The cases in which such NGOs and commissions are attracted to are usually those that border on public interest litigation in which the litigants are vulnerable, uneducated, with very limited resources and having to take on formidable institutions and confront practices that have held them bondage, often for centuries. Clearly, such litigants lack the resources to engage the services of competent lawyers, sustain the litigation, and do what is necessary to present a good case before the court. What is necessary might entail bringing in experts evidence, fund investigations and research to be conducted by anthropologists, historians, sociologists etc. whose research and investigations might be enormous and span a number of years. Examples of such cases are stated below.

The involvement of the Legal Resource Centre in *Pilane v Pilane* is notable. See also the case of *Alexkor & Anor v Richtersveld & Ors*⁵⁶ where Legal Resource Centre represented the respondents. The case of *Shilubana v Nwamitwa* saw the involvement of three amici – the Commission for Gender Equality,⁵⁷ National Movement of Rural Women and the Congress of Traditional Leaders of South Africa. The *Bhe* case also saw the involvement of the Commission for Gender Equality. South African Human Rights Commission and Women's Legal Centre Trust were parties in one of the three cases determined with *Bhe*.

⁵⁶(CCT19/03) [2003] ZACC 18.

⁵⁷Established via section 187 of the Constitution.

An illustration of the significance of the role played by amici in litigation is the case of *Bakgatla Ba Sesfikile Community v Bakgatla Ba Kafela Tribal Authority*⁵⁸ where there was no amici. Perhaps, if amici had been involved in the case the outcome might have been different. In this case, the first applicants made up of 52 families in their local community, sought the transfer of the property held in trust for them by the 2nd respondent who is the traditional leader of the 1st respondent the Bakgatla Ba Kafela Tribal Authority established by the Traditional Leadership and framework Act⁵⁹ made up of 32 villages. Their story is that in 1912, their predecessors, impeded from owning properties in their names due to discriminatory laws, contributed in cash and livestock, and bought the property which is the subject of this dispute, for €800. This purchase was made in the name of the then traditional leader of the Bakgatla Ba Kafela community on the understanding that it would be held in trust on their behalf. Legal title was never transferred to the community leader by their predecessors. The title document capturing the transaction had been transferred over the years to succeeding community leaders until the 2nd respondent, who is purported as holding the property as communal land on behalf on the entire community.

The list of contributors of the purchase price was kept by their predecessors (discreetly for fear of victimization) and explanation of the transaction has been passed down to them through oral history. According to the first applicants, under customary law:

[T]he existence of a community is not restricted to recognition by national and provincial government and ownership of property must not be preceded by recognition of a group of people as a community or tribe in terms of the traditional Leadership and Governance Framework act 2003 or the provincial act to that effect.

Central to their case was the assertion that the applicable customary law then did not preclude them from owning land through purchase. However, the Achilles heel to their case was the absence of historical and anthropological evidence to confirm their position and the judge decided against them. The applicants could not financially sustain this case and the involvement of a public interest NGO might have engaged experts to carry out requisite

⁵⁸Unreported North West High Court Case no. 320/11 (2011).

⁵⁹No. 42 of 2003.

research and present same to the court. This would have aided the process of ascertainment by the court.

In the case of *Alexkor v Richtersveld*, for instance, the involvement of NGOs and amici aided the ascertainment of the applicable customary law by making available to the court a number of documents and expert evidence for consideration. This aided the court in ascertaining the applicable customary law at the time the subject matter of the suit occurred.⁶⁰

It is also important to note that a characteristic of such litigations involving amici is that they often lead to the development of customary law. Usually, very strong arguments are presented with rich research outcomes encouraging the courts to develop customary law after it has been ascertained and found wanting.⁶¹ This is not surprising because after all, one of the main objectives of public interest litigation is social change and this would usually entail the development of customary law away from perceived oppressive features.

The contributions of amici are not restricted to the provision of resources and accessibility to experts. The practice is that when amici are permitted, they must bring additional legal arguments other than those already before the court.⁶² These NGOs and commissions have at their disposal resources that enable extensive research that will benefit a more appropriate finding by the court than the parties in the cases. Often, they present broader issues for consideration by the court beyond that brought by the parties.

The Constitutional Court admitted in *Mayelane* that the written and oral arguments of the parties and amici 'contributed much to the substance of the judgment'. In particular, it stated that 'the amici have provided invaluable submissions throughout the proceedings before this Court'. That the amici's submissions in response to this Court's request for further information regarding Xitsonga customary law have been crucial to the outcome of this case.'⁶³

⁶⁰ Survey-General's reports, colonial office letters, the Select Committee documents of 1888, Cape of Good Hope Correspondence and Report Relative to the Lands in Namaqualand set apart for the Occupation of Natives and others of 1889, Report of Assistant Surveyor-General of 1890, Reports of House of Assembly Select Committee on Namaqualand Mission Lands and Reserves 1896, the opinion of the State Law Advisers, 1925, old relevant letters, archaeological findings from as far back as 1400, writings, books, expert evidence, government docs and writings, and findings of anthropologists, historians and sociologists.

⁶¹ *Bhe v Kayelitsha* supra; *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14.

⁶² Rule 10 (7) Rules of Court, Constitutional Court South Africa. GN R1675 Gazette 25726 of 31 October 2003.

⁶³ Para 18.

The court has also relied on commission reports such as the South African Law Reform Commission as indication that certain normative practices of particular communities have developed. In this line, it is also vital to state here that the court is also reluctant to depart from findings of facts by Commissions with respect to ascertainment. The Constitutional Court has glowingly conveyed their regard for such finding in the case of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others*⁶⁴ on the basis of the enormity of what the Commission undertook to get to its decision. The Supreme Court of Appeal had rejected the position of the Commission on Traditional Leadership Disputes and Claims on the ground that it was not credible. The commission was deliberately misled in its instructions by the respondents which affected their findings. Such was also the position of the court in *Amantungwa & Ors v Mabuyakhulu*.⁶⁵

6.2.2.5 Summary

The range of factors discussed under this section are socio-economic and political in nature and cover judges' ideology and experience, transformation agenda and Constitutional mandate, inability to afford legal representation and incompetence of counsel and the impact of the participation of non-governmental organizations and government commissions on the courts' decisions. All these show that extrinsic factors aside from the applicable rules also impact on how judges exercise discretion in the ascertainment and application of customary law. Directly or indirectly, they also determine the considerations that affect the judges when evaluating evidence and consequently determine the quality of what is put before the court for consideration.

6.3 Conclusion

This chapter discussed supplementary factors comprising of procedural and socio-economic and political factors that influence the ascertainment and application of customary law as they impact on how judges exercise discretion in determining the content of what is ascertained and applied to cases before them. The procedural factors include – considerations in the resolution

⁶⁴ (CCT 67/14) [2014] ZACC 36 paras 79-81.

⁶⁵ SCA Case no 513/09. Where the SCA held that the Commission's instructions were deliberately doctored to influence its outcome.

of evidential contradictions, the hindrance of technicalities, choice of court process in instituting an action, accuracy of interpreters, the role of court registrars, and constrains of appellate courts. The socio-economic and political factors include the judges' ideology and experience, transformation agenda and Constitutional mandate, inability to afford legal representation, incompetence of counsel and the impact of the participation of non-governmental organizations and government commissions on the courts.

The range of these factors glaringly indicates that judges necessarily exercise discretion in the process of ascertainment and application and these discretion are often wide and sometimes misplaced, go outside the legal framework applicable to the process of ascertainment and application of customary law. They cover the range of the professional and extraneous experiences of the judges', their orientation, their mandate, professional expertise, requisite knowledge or the lack of it and incompetence. Notwithstanding, they impact on how judges exercise discretion in this process and reveal the mind-set of the judges as they do this, at least to an extent. These factors also impede or ensure the ascertainment and application of living customary law and should be carefully considered to ensure that they do not block the ascertainment and application of living customary law by the courts of superior jurisdiction in Nigeria and South Africa.

Chapter Seven

Factors that influence the ascertainment of customary law in the lower courts in Nigeria and South Africa.

7.1 Introduction

This chapter focuses on identifying the factors that influence how lower courts in Nigeria and South Africa ascertain and apply customary law. At the lower courts in Nigeria are the magistrate courts, customary courts and area courts; in South Africa are the magistrate courts and the courts of chiefs and headmen. Area courts and magistrate courts are excluded here since in the Federal Capital Territory, they do not ordinarily apply customary law. The courts discussed in this chapter are quite distinct in particular ways from what may be seen as their counterparts across the two jurisdictions. Their similarities and differences are probed in order to discover how certain goals are achieved differently.¹ A reference to each of the court types in this chapter also indicates the particular country where they are based.² The use of the terms ‘magistrate’ connotes a reference to the magistrate court, ‘judge’ connotes a reference to the customary court unless indicated otherwise, and ‘chief/headman’ connotes a reference to the chiefs’ and headmen’s court.

At the initial stage of this chapter is a brief overview of the establishment and jurisdictions of these courts. Their distinctions in jurisdiction and form are stated and factors that influence how the judges ascertain and apply customary law are identified and most of these factors are common across the court types in both jurisdictions. Where the factors are distinct or feature differently for any particular court type, it is indicated. The primary data utilised here were garnered from the interviews conducted with the judges, magistrates, court registrars, clerks, chiefs and counsellors triangulated with records of proceedings of cases heard by these courts as well as relevant laws and rules of court.

¹John C. Reitz ‘How to do comparative law’ (1998) AJCL 622.

²For instance, a reference to the customary court in the discussion indicates that the situation in Nigeria is being discussed.

As with the two previous chapters, this chapter is located on the premise of the concepts and theories discussed in chapter two and confirm that judges do exercise discretion in the ascertainment and application of customary law and that this discretion is often widely exercised. The factors identified are broadly classified under the categories of institutional, substantive and procedural. Again, I state that these categorizations are based on my own parameters and are meant for easier discussions. Even though they broadly appear similar with those identified from the superior courts, in details they distinctly reflect the peculiarities of the nature and structure of the lower courts. This chapter supports the premise that where discretion applies, it is influenced by a number of factors which are also intrinsic and external to the applicable rules of court. It also states that there is another form of discretion which exercised in the purview of the flexibility of customary law which is contextual but is discretion nonetheless.

7.2 Lower courts with jurisdiction to hear matters of customary law – Nigeria (Abuja, FCT) and South Africa (North West Province)

These courts are briefly discussed below:

7.2.1 Customary courts in the Federal Capital Territory, Abuja – A brief background

Abuja, as the Federal Capital Territory (FCT) of Nigeria, is located in central Nigeria and carved out of the Northern Region. It is originally comprised of mainly Gbagyi, Toro, Ganagana, Gwandara and Bassa speaking people.³ Being the Federal Capital Territory and housing the headquarters of federal ministries and parastatals, it has a diverse population comprising peoples of the diverse language groups and other communities in Nigeria.

With respect to the adjudication of customary law, as in other Northern States, different grades of Area Courts were established in the FCT with jurisdiction over cases of customary law. However in 2007, being a FCT for the entire Country, customary courts were established to also

³See 'A Brief Overview of Abuja (Federal Capital Territory)' available at <http://www.abujagalleria.com/Abuja/about-abuja.html> (accessed on 28/12/2016). See also 'Abuja' available at <http://www.newworldencyclopedia.org/entry/Abuja> (accessed on 28/12/2016).

reflect the structure in the Southern part of the Country. However, since these customary courts were given the sole jurisdiction over customary law matters, the area courts were divested of their jurisdiction over same.⁴ The customary courts are therefore the sole courts of first instance in customary law adjudication in the formal court structure.⁵

The customary courts in the FCT have two certain distinguishing features from other customary courts in Southern Nigeria and their counterparts called area courts in Northern Nigeria. First is the fact that despite the provisions of the Customary Court Act which provides for the establishment of different grades of A, B and C customary courts, it has only the highest grade which is grade A.⁶ Secondly, only qualified legal practitioners sit as its judges.⁷ Appeals go from these customary courts to the Customary Court of Appeal, FCT on customary law matters and to the FCT High Court on other matters not related to customary law.⁸ The FCT customary courts are in the different Local Government Councils (LGC) of the FCT which consist of Abaji, Abuja Municipal, Gwagwalada, Kuje, Bwari and Kwali. Interviews were conducted in customary courts situated in four locations within three LGC which are Dutse (Bwari LGC), Kubwa (Bwari LGC), Gwagwalada LGC, and Garki (Abuja Municipal LGC situated in the heart of the City).

The customary courts exercise jurisdiction only over persons who reside within the FCT and submit to its jurisdiction.⁹ The applicable customary laws in a case are those to which the person agrees to be subject to, or that are applicable to a person's community of origin, or customary law applicable in a location where a person does an act, or that is applicable to an estate on which a person makes a claim.¹⁰ The scope of the customary courts' jurisdiction covers issues bordering on customary law, on succession and administration of estate,

⁴The area courts had jurisdiction over customary law and Islamic law. The Area courts later became Islamic courts after customary law matters were transferred to the newly formed customary courts even though they are still called area courts. The judges at the area court who were not learned in Islamic law but were versed in customary law were eased out of the system and could not be absorbed into the customary courts because the customary courts employed only legal practitioners as judges.

⁵See sections 62-64 which are transitional provisions of the FCT Customary Court Act no.8 2007.

⁶Section 1 (1) and the Schedule to the Act *ibid*.

⁷Section 4 (1) (a) & (b) *ibid*.

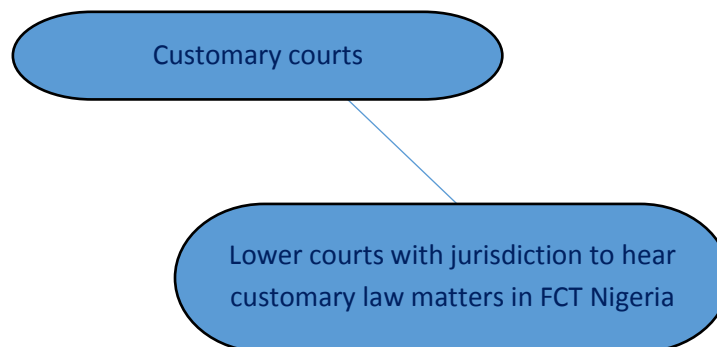
⁸ These matters pertain to procedures and statutes.

⁹Section 14 (1) of the Act.

¹⁰Section 18 (1).

matrimonial causes, custody and guardianship of children, civil causes that pertain to debt and demand of dowry and damages.¹¹

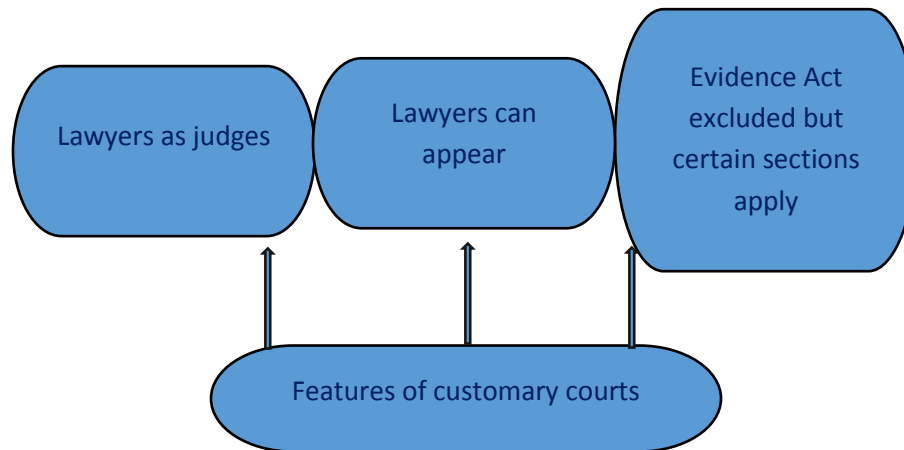
The procedure in this court commences with an aggrieved person filing a case in the court. The defendant is then notified and responds to the plaintiff's claim in person as to whether the plaintiff's complaint is true or not. The plaintiff is then given the opportunity to state his/her case and calls witnesses to testify in his/her favour.¹² The court will then determine the case through a ruling on whether or not the defendant has a case to answer. Where the court finds that the defendant has a case to answer, the defendant is then invited to present his/her defense before the court. The defendant may choose to testify and call witnesses to testify on his/her behalf and then close his/her case. It is at the stage of testifying before the court that evidence is led towards the ascertainment of the applicable customary law. A final address is made by either party or their counsel and the court gives its judgment applying the customary law ascertained.¹³ This brief narration gives insight into the operation of the courts on which the analysis below is conducted for the identification of the factors that influence its ascertainment and application of customary law.



¹¹Section 14 (2) and Part 1 of the Schedule to the Customary Court Act. Note that the court has jurisdiction over other civil claims outside customary law under certain debts, demands and damages. See also section 16.

¹²Order 9 rules (1) & (2), order 10 rules (4) & (5) of the FCT Customary Court (Civil Procedure) Rules, 2007.

¹³Order 10 rules (6) – (7) & (9) of the rules *ibid*.



7.2.2 The courts of chiefs and headmen South Africa – a brief background

The Bahurutshe, sometimes called Lehurutshe, are part of the Bakwena tribe which are sometimes known as the Bakon¹⁴ and descended from the Tswana people part of whom are located in the North West Province of South Africa.¹⁵ Interviews were conducted in three courts in Gopane, Dinokana and Moshana Lencoe from which appeals go to the magistrate court at Lehurutshe. These three communities' courts are part of the six communities that fall under the clan of Bahurutshe. These communities are Bagalencoe (Moshana Lencoe), Gopane, Dinokana, Suting, Tshiete, and Motswedi.

These courts of chiefs and headmen were established by the Blacks Administration Act¹⁶ with jurisdiction to hear customary law cases. The courts of chiefs are composed of traditional leaders and their counsellors while the headmen sit as judges in headmen courts. Though the Black Administration Act is repealed,¹⁷ these courts still subsist by virtue of section 16 (1) of Schedule 6 of the South African Constitution which states:

Every court, including courts of traditional leaders existing when the new Constitution took effect, continues to function to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject

¹⁴Mpotokwan J 'A short history of the bahurutshe of king motebele, senior son of King Mohurut' Botswana (1974) 6 NR 37 available at <https://www.jstor.org/stable/pdf/40959208.pdf> (accessed on 20/11/2016).

¹⁵Kadishewene available at <http://kaditshweneheritage.co.za/historical-background/> (accessed on 20/11/2016).

¹⁶No. 9 of 1929.

¹⁷With the exception of sections 12, 20 and the third schedule which continues to be in force until the relevant legislation is passed on the subject.

to- (a) any amendment or repeal of that legislation; and (b) consistency with the new Constitution.

In addition, section 211 (1) of the Constitution specifically recognizes the 'institution, status and role of traditional leadership, according to customary law' which is also subject to the Constitution. In the *Recertification of the Constitution of the Republic of South Africa 1996*¹⁸ case, the Constitutional Court affirmed these provisions as ensuring the continued existence and legitimacy of the courts of chiefs and headmen and their adjudicatory roles in the constitutional era.¹⁹ According to Himonga et al 'the perpetuation of the institution meets the needs of the indigenous people in the communities who otherwise would have challenges accessing other mediums to seek justice'.²⁰

The jurisdiction of this court is conferred by the Minister of Justice and Constitutional Development on any traditional leader appointed or empowered by the Act.²¹ Jurisdiction is limited to civil matters of customary law and custom between black persons who reside within the community. It excludes matrimonial causes deriving from statutory and customary law marriages. The court can however hear cases of petty crimes.

The courts of chiefs and headmen are located in the particular rural community of the chiefs. They are traditional institutions co-opted into the formal court structures because they are statutorily recognized and regulated. Appeal goes from the court of chiefs and headmen to the magistrate courts, then to the high court, the Supreme Court of Appeal and finally to the Constitutional Court if it raises constitutional issues such as the violation of Constitutional rights.²²

The Chiefs' and Headmen's Civil Court Rules²³ regulate their proceedings throughout South Africa. Section 1 of this Rules provides that 'the recognized customs and laws of the tribe' shall regulate procedures on civil claims and legal practitioners have no right of audience in the

¹⁸(CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

¹⁹ This is an unprecedented case in which the court affirmed that the provisions of the proposed Constitution is in line with the principles of the old Constitution based on its 'historical, political and legal context'. See para 1.

²⁰Himonga C, Nhlapo T, Maithufi I, Mnisi-Weeks S, Mofokeng L & Ndima D. *African Customary Law in South Africa Post-Apartheid and Living Customary Law Perspectives* (2014) 254.

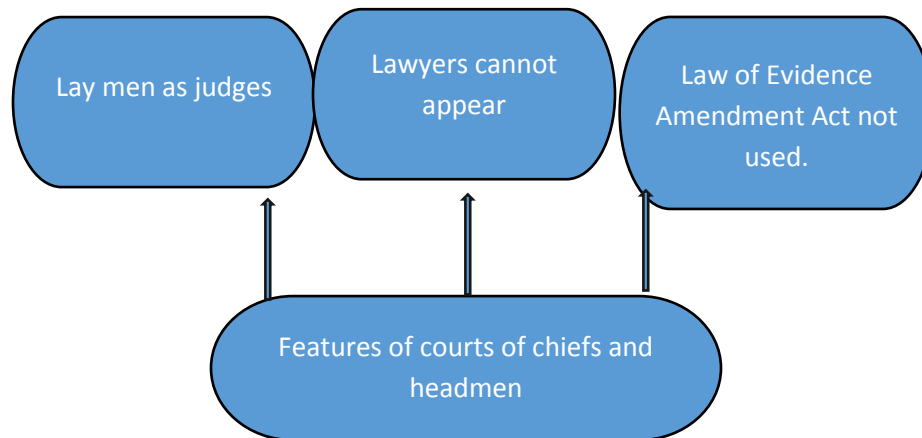
²¹Sections 12 & 20 BAA.

²²Section 167 (2) (a)-(c) 1996 Constitution of South Africa.

²³GN R2028 of 29 1967.(Repealed in 1989 in KZN).Also in Reg. Gazette 887 of 29 December 1967. The Rules were enacted by virtue of section 12 of the BAA.

court.²⁴ Adjudication is participatory and everyone present may participate in examination of the parties and their witnesses. Chiefs and headmen's courts in North West Province keep written records of proceedings.²⁵

The chief's court sits as an appellate court over the decisions of *khotlas*, i.e. headmen, either with the *kothlas* or with the council made up of the chief's uncles and are well advanced in age. For Gopane, the chief sits with his *kothlas* on certain days to hear any matter referred from the *kothlas* which could it not resolve, or considers above its jurisdiction to resolve. Matters could also be referred from one *kothla* to another if the headman is not confident that he would be unbiased.²⁶ The matters that come before the chief are generally in areas of cattle, marriage, seduction, breach of promise, claim of fields, misconducts etc.



7.2.3 The magistrate court

Interviews were conducted in the magistrate courts at Lehurutshe and Mafikeng and the regional magistrate court also at Mafikeng. The magistrate court is comprised of the regional and the district courts established by the Magistrate Court Act.²⁷ Its jurisdiction is territorial.

²⁴ Rule 5.

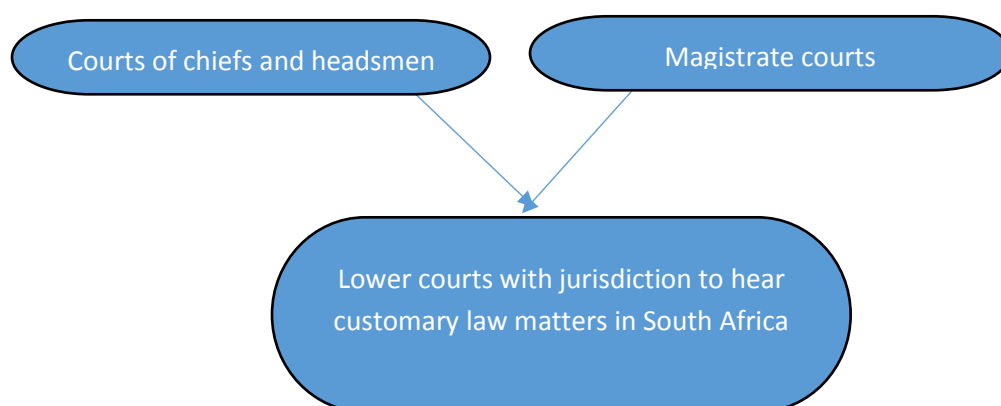
²⁵ Step 7 sub (3) of Guidelines and Procedures Department of the President's Administration in Tribal and Community Authority Offices enabled by the Bophuthatswana Code Traditional Courts Act 29 of 1979.

²⁶ In the case of *Moruakgomo David Molefe v Sello Solomon Mokgatlhe* Unreported Bahurutshe Ba Ga Gopane Tribal Court Case No. 03/2002 the plaintiff had filed the case in the defendant's *kothla* but it was transferred to the head *kothla* because the first headman admitted to being afraid of the defendant.

²⁷ Magistrate Court Act 32 of 1944 as amended.

The Magistrate Court's Rules regulate its proceedings.²⁸ The criminal jurisdiction of the regional courts for which assessors are engaged are excluded here²⁹ because this thesis is restricted to the engagement of customary law in civil cases.³⁰ The district magistrate courts hear appeals from the courts of chiefs and headmen.³¹ These appeals are not conducted in the conventional style because the cases are heard *denovo* as in a court of first instance. Though some of the cases on appeal may not involve customary law *per se*, such as cases of petty theft, some do.

The procedure in the magistrate court is similar to that of the customary courts in Nigeria except that the magistrates sit with assessors.



7.3 Factors that influence the ascertainment of customary law in the lower courts

The factors that determine how judges ascertain and apply customary law at the lower courts are not exactly the same for the customary courts and the magistrate courts on the one hand, and the courts of chiefs and headsmen on the other hand for obvious reasons. The first is that these courts differ in nature. While the former broadly speaking are English styled, the latter is a cooption of a traditional institution legitimated in the community where it serves. The second is that they are manned by judges whose competence is measured differently. The former have qualified legal practitioners schooled in Eurocentric concepts while the courts of chiefs and headsmen are measured by their knowledge of the customary practices of their community

²⁸ GN R1108 in Regulation Gazette 980 of 1968 as amended by GN R 880 GG26601 of 2004.

²⁹ Section 93 Magistrate Court Act.

³⁰ They hear matters on divorce and child custody where customary law is applied

³¹ Section 29 (a) Magistrate Courts Act.

where they are and how they apply these two cases before them. The third is the epistemological differences of the requisite knowledge. While that of the magistrate has leanings to positivism, the other is rooted in a different jurisprudential sphere under legal pluralism. Yet these courts have to apply customary law which they may do differently at least to an extent. The magistrates hear appeals from decisions of the chiefs' courts and sit with two assessors to do so. The customary courts utilise experts, i.e. people versed in the particular customary law who are usually chiefs or elders from the community.

This segment therefore identifies factors that may be peculiar to each court, or may be common to all. The discussion indicates whether the factors identified apply to each or all of these courts. These courts are treated together in this chapter simply because they fall under the category of lower courts according to how the chapters are arranged. The factors identified are discussed below as institutional, substantive and procedural.

7.3.1 Institutional factors

As explained for the superior courts, these factors are associated by a common feature which is that they occur, either directly or indirectly, as a consequence of institutional arrangements. They comprise exposure to customary law, hierarchy of magistrate courts over customary courts, systems of consultations, impact of the state law on customary law and the engagement of lawyers.

7.3.1.1 Exposure to customary law

All the judges in the customary courts and the magistrate courts are qualified legal practitioners and the contents of their formal training as it relates to customary law is sparse and does not adequately prepare them for adjudication in customary law cases.³² The magistrates interviewed admit to not having the expertise to adjudicate on customary law matters but for the assistance of assessors. Though the judges in the customary courts primarily hear customary law matters, they had no special training on customary law during their studies except for one of the judges who had extensive exposure to customary law during his study due to the special interest of one of his lecturers. The situation with some of the magistrates is

³² The content of their training is similar to that discussed under 5.2.1.1.1 in chapter five.

similar. All the customary court judges interviewed are from other parts of the Country outside the communities indigenous to the location of the courts.³³ Yet, these judges all hear matters that require the application of different customary laws including that of the community where the courts are situated as a result of the cosmopolitan and heterogeneous residents of the FCT.³⁴

For both the magistrates and the judges, their exposure to their respective indigenous customary laws were either extensive, moderate or none. This is either because they grew up in their community of origin or had spent some time there, or they grew up outside their community of origin, such as in a township or in an urban area, with no exposure to customary law. While the magistrates had only worked as prosecutors prior to their appointment as magistrates and had no or very little engagement in customary law at that level, some of the judges had extensively handled customary law cases while in legal practice before their appointments.³⁵ Yet these magistrates hear appeal from the decisions of the courts of chiefs and headmen and sometimes overrule the decisions of the chiefs. Judges with little prior experience in customary law also serve as customary court judges. In judicial capacity, the experience gained in adjudication on customary law issues has helped both the judges and magistrates in appreciation of its concepts and nature.

With the deficiencies in the training of these judges and magistrates, trainings that aid judges and magistrates in ascertaining customary law could be adopted to augment this challenge but this is not given the seriousness it deserves. In Nigeria, there have been seminars and workshops organized on customary law to aid the judges in its adjudication even though they are sparsely done.³⁶ Judges have indicated the usefulness of these seminars/workshops but not all judges have had the opportunity to attend them due to cost. In South Africa, the

³³Except a retired area court judge who served as a lay judge under the area court before the establishment of the customary court in the FCT. He was relieved of his appointment because he was not a qualified legal practitioner.

³⁴Such as the case of *Haruna Kaye v Yusuf Sarki* where none of the judges who presided is from the community of the subjects within the jurisdictional location of the court.

³⁵The reason for this could be that magistrates may be normally appointed from prosecutors and they are not usually exposed to customary law in their line of work.

³⁶ The Nigerian Institute of Advanced Legal Studies organized one in 2014 and some judges were sponsored by the government to attend. See also the All Lower Court Judges Biannual Conference in Nigeria.

magistrates interviewed stated that there have been no seminars and workshops organized to educate them on the concept of customary law and its adjudication but some are in view.

It is vital to also mention here that the residual knowledge of the judges and magistrates one way or the other influences how they exercise discretion in the ascertainment and application of customary law. The residual knowledge is either based on Eurocentric conceptions of law derived from their training or based on their own perception of what they think the content of the applicable customary law is. The latter is especially so where they are from the community where the courts are located.

With respect to the chiefs and headmen, there are no formal academic requirements for their appointment and they are therefore gauged under different parametres, i.e. their 'familiarity' with the applicable customary law which is recognized as one of the advantages of the court.³⁷ One of the traditional leaders was born and grew up in his community of origin. He attended a school for chief's leadership in 1969 within the North West Province and thereafter took up other employment in another town not related to customary law. He returned to become as a chief in the community in 1985 after the death of his father who was a chief. He was born in 1946.

The second traditional leader was born in 1954 in his community which is also where he grew up. He was educated as a teacher and commenced the study of law at the university before he dropped out in his second year. He worked as a recruitment officer for the public service commission until he returned to the village in 2000 and worked closely with his father in the administration of the village until his father passed on in 2001. He was appointed as the chief in 2002 to replace his father. His knowledge of customary law was based on his lived experience and the oral education he obtained from his elders.

The third traditional leader is the eldest son of the last chief. He was born in the village and grew up there except for a four year absence in his teens and when he worked at the mines in Rustenburg after his matric. He returned in 2013 to succeed his father just about a year to

³⁷ South African Law Commission Discussion Paper 82 Project 90 The Harmonization of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional May, 1999 2.

the date of the interview. He appeared a bit uncertain about the contents of customary law and referred me to his uncle who according to him, 'knows everything'.

In summary, the training received by magistrates and judges, as one of them stated, 'was a general overview' and not sufficient to prepare them in the adjudication of customary law cases particularly with respect to its ascertainment and application. This training cannot on its own enhance the exercise of discretion towards living customary law. However, juxtaposed with other factors discussed in this chapter, their ascertainment and application of living customary law may be aided. While the chiefs are more suited from their exposure to apply living customary law to cases before them, the deliberations with *kothlas* and elders make this even more guaranteed.

7.3.1.2 *Systems of consultations*

There are systems of consultations utilised in the lower courts of both jurisdictions with differing effects. The systems of consultation utilised in the customary courts aid the exercise of discretion towards the ascertainment of living customary law because these consultations make relevant information available to the court for consideration. The term 'systems of consultations' is used here to collectively refer to the different types of consultations that take place at the lower courts. These extend beyond the use of assessors and amici as done at the higher courts to include information received outside the formal sittings of the courts.

In Nigeria, where there is contradiction in what constitutes the content of the applicable customary law, the courts have invited chiefs either on its own motion or as suggested by the parties. This is in order to obtain further evidence from the community indigenous to the FCT where it pertains to its customary law as in the case of *Dorcas Adamu v Adamu Garba*.³⁸ Here, a title holder in the palace of *Sarkin Pada* of *yangodi* was invited by the court to testify on the content of the applicable customary law.³⁹ With respect to tribal communities outside the FCT, the courts have also invited chiefs from the communities' tribal associations based in the FCT. This is for reasons tied to convenience, cost effectiveness and the more likelihood of the

³⁸Unreported FCT/CC/YAN/CV/31/2013.

³⁹His testimony was with respect to whether the bride price and the cost of the wedding ceremony should be refunded by the bride at the dissolution of marriage.

presentation of the variations that may have evolved in the particular urban community. Such was the case in *Ukauwa & Ors v Chineye & Ors*⁴⁰ where the chief of the Igbo community in the FCT was invited to testify on the content of the customary law of the community with respect to where a deceased titled holder should be buried.⁴¹

The court usually gives the parties the chance to suggest whom they would want the court to invite but the court sometimes chooses whom to invite and prefer that the parties have no prior knowledge of who is being invited for the sake of neutrality and, the credibility of the evidence to be presented. An instance is the case of *Haruna Kaye v Yusuf Sarki*⁴² where after the testimonies of the witnesses of both parties, the court, after the visit to the *Locus in quo*, invited the oldest and second oldest men, and the chief Imam of the village to testify on the content of the applicable customary law. After answering questions put to them by the court, counsel to both parties cross examined them. These consultations aid the court is in determining living customary law.

One of the flaws to this system of consultations is where an expert suggested by a party fails to appear, and the court is left with the evidence of that invited by the other party which is not in favour of the opposing party. In such an instance, the court took the position of the evidence of the chief which agreed with the version of the party by whose suggestion he was summoned with regard to whether, at the dissolution of marriage under customary law, only the bride price should be returned without the customary gifts.⁴³ The court's exercise of discretion was based on the evidence before it without credence to what the other evidence might have been had the other chief testified. Another flaw is where litigants cannot afford the cost of bringing these traditional experts, since some of the courts do not cover the expenses of the witnesses summoned.

There are instances where the evidence of the independent witness summoned by the court is not convincing. A judge explained that in such an instance, she further consults other persons who may be in a position to have the requisite knowledge as well as other superior

⁴⁰Unreported FCT/CC/GWA/CV/13/2011.

⁴¹Title holder simply means a person bestowed with a form of honourary recognition by his community.

⁴²Unreported FCT/JD/CC/Kwa/CV.15/11.

⁴³Based on interview conducted.

officers and colleagues as to what to do. She further consults texts and precedents on the matter as a guide. These further consultations have their loopholes where the information gotten is not made available to the parties for examination. Other loopholes are the limitations of texts and precedents.

Also, the court can require any person present to give evidence where it is of the opinion that the evidence may be relevant to the matter as in the case of *Dorcas Adamu v Adamu Garba*.⁴⁴ Here, the court formally adopted the assertions of the petitioner's father as testimony on the content of the applicable customary law on divorce with respect to the requirements for a valid divorce.⁴⁵ The father was in court to ask for more time to explore reconciliation between the parties and merely responded to the court's questions as to the content of the applicable customary law on divorce. The court asked subsequently if his response could be adopted as evidence on the applicable customary law to which he agreed. He subsequently took an oath and his testimony was regarded by the court as that of an expert. The step taken by the court was made possible by the court rules which allowed for a flexible trial to enable the court to take certain steps for the overall aim of attaining justice.⁴⁶

In South Africa, the application of customary law in the court is mainly done by the magistrates and the chiefs in their respective courts even though they both consult with persons regarded as being conversant in the applicable customary law. This is not on the same basis since the magistrates are not necessarily versed in the customary laws but the reverse is generally the case for the chiefs. While the chiefs sit with a group of councilors, the magistrates operate with the assistance of assessors. These assessors sit with the magistrates and hear the testimonies of the witnesses in court, and then give their opinion with respect to the veracity of the testimonies and the issues raised from the perspective of customary law.

Crucial to the magistrates exercising their discretion appropriately is how versed the persons who serve as assessors are in the applicable customary law. Assessors are appointed through the office of the Premier. Persons appointed as assessors are presumed to be versed in the customary law of their respective communities. Though chiefs sometimes serve as

⁴⁴Supra.

⁴⁵This is in accordance with section 34 of the Act.

⁴⁶Order 11 rule 2 FCT Customary Court (Civil Procedure) Rules 2007.

assessors in the district and regional courts, persons who have lived in the community and are usually advanced in age are usually appointed even from retired teachers, policemen and civil servants.

When faced with a case in which the customary law ought to be ascertained, the magistrates would consult from the list of assessors and nominate two to sit with them on a case. These assessors advise the magistrate in chambers when the case of being determined. This system of consultations should enhance the ascertainment and application of living customary law but this is determined by the assessors' knowledge and credibility

On the other hand, the chiefs and headmen's court sit with their councilors who fully participate in the cases and where the chiefs are in doubt with respect to any particular customary practice, they consult with their councilors. This is necessary because the chiefs are sometimes young or may have been recalled from other places outside the community to assume their position after the demise of their predecessors. As such, they need time to be properly groomed in the customs and traditions of the community and may come across cases where they will need the guidance of the councilors. This system of consultations no doubt has greatly aided the ascertainment and application of living customary law.

At the community level, there are also some form of referrals from the headmen court to the chief's court and *vice versa*. Where the headmen regard the matters to be too serious for them to hear and where the chief believes that the issue raised in a matter should be addressed internally within the family, referrals are made. In all circumstances, where customary law is applicable, it is done by those best suited to do so and hence enhances the application of the living customary law. Also not directly connected to this is the procedure at the chief's court hearing an appeal from the headman's court where the headman can be summoned to testify and explain the reasons for his decision. This no doubt will enhance a discretion towards the ascertainment and application of living customary law by bringing to bear issues that may be relevant to content and variations of the applicable customary law.⁴⁷

⁴⁷See the case of *Kharu Matlhoko v Bothonoka Pheto* Unreported Magistrate Court Lehurutshe case no. 04/11 where the chief's court hearing appeals from the headman's court summoned the headman who explained the reasons for his decision.

One of the chiefs, where there is uncertainty within the councilors, would further consult with some elders in the village and within the chieftainship which include his aunties and nephews and other chiefs who are outside the community but are his brothers. Another chief consults with the elders and the magistrate. Another explained that he consults with the elders and the magistrate before he passes judgment when he is faced with a difficulty in the application of customary law. He states that though he is not required to consult with the magistrate, he does so all the same to be able to integrate customary law to constitutional standards. With respect to purely customary law matters however, he consults with his elders who sit with him and are presumed to be versed in customary law and may adjourn a case for in-depth consultation. These elders are also from the royal family. Their role is advisory and the final decision lies with him. Where the elders disagree on the content of the customary law, he further consults other elders who are outside the court for advice and he also follows his instinct and personal knowledge.

Where a case requires the application of a customary law foreign to the community, the chiefs' courts handle this differently. One chief explained that the foreign community of the party will first be confirmed, and then the chief of the foreign community will be contacted through a letter relating the issues in detail. Thereafter, someone may either be sent to the foreign community or from the foreign community to sit over the matter together with the host community. Both chiefs on the same hierarchy may jointly preside over the matter or a headman or one of the tribal authority may be sent to join in presiding over the matter. Such matters are usually amicably settled by both chiefs/ headmen and dissatisfied parties appeal to the magistrate courts.

Another chief would invite the family and elders of the foreigner who are versed in the particular custom as suggested by the party to participate in the adjudication for their inputs. Another chief however, would refer any such matter to the magistrate for resolution. On my enquiry as to why he has not considered collaborating with the chiefs and headmen of such persons with respect to resolving such disputes, he expressed that he would endeavor to try this practice should he be faced with a similar situation. The consultations adopted by the first two chiefs would lead more towards the ascertainment of living customary law.

The systems of consultations practiced by the customary courts and the magistrate courts differ on the ground that for the customary courts in Nigeria, the parties often have a say as to the experts to be invited and these experts are subject to cross examination by the opposing party. For the magistrate courts in South Africa, on the other hand, the parties have no say in the assessors selected to sit with the magistrate. These assessors are also not subject to cross examination and cannot be challenged on their knowledge of the applicable customary law. Yet based on their inputs, the magistrate court can annul the decisions of the chiefs' courts. Therefore, the practice of the customary is more likely to lead towards the ascertainment of living customary law. With respect to the chiefs and headmen courts, their systems of consultation aid the exercise of discretion towards living customary law beyond that utilised by both the magistrate and customary court, except the consultation with the magistrate which raises caution.

7.3.1.3 *Hierarchy of magistrate courts over chiefs and headmen's courts*

On appeal, magistrates may confirm or overrule the decisions of the chiefs and headmen on the content of the applicable customary law which the chiefs and headmen are better versed in. The chances that the magistrate might err in their exercise of discretion in ascertaining and applying living customary law to the particular case is there even with the aid of assessors. This is even so where the assessors are unaware of the variations and nuances of the particular clan or family.

Although these assessors are sometimes chiefs, the mode of trial at the chiefs and headmen courts presents more avenue for the application of living customary law due to the deliberation of the entire council of chiefs who are well versed in the applicable customary law. Added to this is the less tendency for bias having regard to the number of the council members which are sometimes up to twelve as opposed to just two assessors that sit with magistrates.⁴⁸ In addition, there is the ability to capture the nuances and give particular

⁴⁸These members range from about 7 to 12 in number. See *Mongae Tiro V Sebogodi Israel Bahurutshe Ba Ga Gopane Tribal Court Case No. 15/2003* and *Molokwane Modise Vs Molokwane Semakaleng Tribal Court of Bahurutshe Ba Ga Gopane Case No. 01/2011*. The record of proceedings in the case of *Magakala M. Versus*

attention to the circumstances of the cases before them which reflects the flexibility of customary law. This is very crucial in the application of customary law because in such instances, what is at play is not just the customary rules but the encompassed social, economic and relational context geared towards reconciliation, restoration and justice. Who then is better situated to address this than the chiefs and headmen who live within the communities and are familiar with the situations? Discretion is at play on how this is resolved relying on general rules but applying the customary norms contextually.

The records of appeal sent to the magistrate court from the chiefs and headmen's court contain the facts and evidence before the court and the court's decision which is devoid of any analysis. These records are handwritten by the tribal clerk during the trial in minute form usually in the Tswana language. The nature of the appeal proceedings at the magistrate court differs from the higher courts in that the proceedings entail both the use of the records of proceedings from the chiefs' court and a fresh presentation of evidence which may include bringing people knowledgeable in the customary practices of the community to testify.

The customary courts in the FCT do not have the privilege of being manned by the local chiefs and elders versed in the applicable customary law but the chiefs and elders can be summoned to court to testify on the contents of the applicable customary law when needful. Also, appeals from the customary courts go to the customary court of appeal manned by judges who are supposed to be learned in customary law.⁴⁹ The customary court of appeal sits in a panel of three and does not utilise assessors but may invite experts in the applicable customary law when necessary. The court works with a more detailed record of proceedings and usually an analytical judgement from the customary courts which gives them insights into the considerations and analysis of the basis for the decision. The customary court of appeal cautiously refrains from altering decisions of the customary courts unless a clear case of injustice is revealed even with respect to the content of customary law ascertained and applied by the court below. Not having local chiefs as judges cannot be down played as far as

Magakgala Magogwe Unreported Bahurutshe Ba Ga Gopane Tribal Court Case No. 02/2012 reveal such engagement of members of the council and others from the audience in the hearing of a case.

⁴⁹Even though it is not necessarily the case. See 5.2.1.1.1 in chapter five.

ascertaining and applying customary law is concerned. The utilization of chiefs and elders as experts however, would aid the ascertainment and application process.

The material in this and the next sections would be interesting for an article on how living customary law evolves.

7.3.1.4 *Impact of the state law on customary law*

Flowing from the consultations of magistrates by chiefs in their adjudication mentioned above, is how the state laws impact on the application of customary law by the chiefs who ordinarily should apply living customary law. This is a challenge to the application of living customary law by the chiefs and headmen's courts. One of the chiefs admits to having a transitional experience in trying to strike a balance between keeping the customary laws on the one hand, and civil laws and democracy on the other. He explained a form of intermingling to accommodate the civil system within the framework of the values of customary law as he expressed in his own words:

It's a form of a transition ... you see still keeping the customary kind of laws and traditional ones at the same time, we are not stagnant to it ... we are sort of flexible to the new laws and democratic ones so the two find one another.

Another chief expressed a form of dilemma. While he is very reluctant to develop customary law to bring it in line with the Constitution because he would want to protect customary law and its values as well as the Constitution, he will try to 'strike a balance' in every possible way to harmonise the provision of the Constitution and customary law by compromising on both sides. According to him:

We should bear it in mind that even if it is a customary law, it's got to be subject to the constitution. It's got to be in line with the constitutional dictates, imperatives and so on.

He however explained that where there is a precedent from a high court that contradicts customary law, he will presume that the court correctly interpreted customary law and adopt the precedent. This is especially so where both the ascertainment by the high court and the actual practice of the community are in line with the Constitution yet they contradict each other. He states that he would go with the decision of the high court because ultimately

when it comes on appeal, the high court can overrule their decision. This chief appears to contradict himself.

What this reveals is that the main concern for the chief is not solely to bring customary law to be in line with constitutional provisions. Rather it reveals a mind-set that undermines the customary law system by a faith in the state court's ability to know better the content of the customary law of his community. This gives a picture of intimidation by the state centralist and positivist structure over the traditional structure responsible for the preservation of the customary law system. No doubt this mind set will lead away from the ascertainment and application of living customary law even by the chiefs and headmen's courts. These courts should instead endeavour to preserve benign values and rules of customary law while seeking to comply with constitutional provisions.

Though another chief admits to following the 'rules of the Country' and the Constitution as well as customary law in cases before him, he states that he would apply customary law to disputes before him despite the existence of a judgement of the high court that contradicts the applicable customary law.

Another way of feeling the impact of state law over customary law is in the form of training given to chiefs and headmen. Even though one of the chiefs explained that there is no form of training to enable them to adjudicate on customary law, the Judicial Education Institute under the office of the Chief Judge have commenced courses to train chiefs on judicial work so as to prepare them to give decisions that are consistent with the Constitution.⁵⁰ There have also been other workshops organized by the government at Rustenburg in this respect.⁵¹ The implication of these, with respect to the ascertainment and application of living customary law, is that it may reinforce the already felt domination of the state laws and its institutions and its impact might be far reaching.

It does appear that chiefs are still guided by their lived realities which might be in conflict with decisions of superior courts. For instances, a vignette on the scenario of the facts of the *Bhe* case was presented. The facts used were: What happens to the estate of a man who dies leaving two daughters born outside wedlock with no son and is survived by his elder

⁵⁰Based on information received from one of the Magistrate interviewed.

⁵¹Based on interview conducted.

brother and father. A chief confidently said the elder brother would inherit in such an instance and gave the vernacular term for the customary practice which is *siyacu*. The chief is however conscious that the courts would defend certain rights not permitted under customary law. Judgements of higher courts that affect customary law are not brought to their attention and there is no formal structure of bringing this to their awareness.

Chiefs sometimes go to the magistrate courts to observe what is done there. This development threatens the traditional form of adjudication as the chiefs may be prone to alter their system of adjudication to suit the Western styled courts systems. Even though chiefs record proceedings in compliance with directives from the House of Traditional Leaders,⁵² one of them explained that he also keeps records as a guide, so that should he be faced with a similar matter he had previously adjudicated on, he would refer to the records to see what decisions he had made in the past in order to apply same to the current case before him.

This again is an indication that the contextual application of living customary law based on its flexibility is being threatened and whether the application of living customary law is actually being affected. The extent of this threat calls for further focused research for confirmation. It is also an indication that gears towards Woodman's propositions that once traditional courts become formal courts, they too cease to apply living customary law because the norms become institutionalized and assume a different form to fit into the formal courts.⁵³ This indication provides a basis for further research to investigate the effect of the circumstances created by the impact of the state law/institutions on customary law and its effect on the chiefs. The structure of the chiefs and headmen's courts is still relevant with respect to the ability of the courts to apply living customary law.

Chiefs sometimes apply both customary and the Roman-Dutch/Common law such as in the case of *Batlaki Motsosi Mahibitswane Vs Defendant: Petrus Jonas – Ikageleng*.⁵⁴ Here, the chief acknowledged that the defendant's marriage in community of property evidenced by a marriage certificate dated 19/07/1977 to the claimant's late sister was central to the claims of

⁵² For the chief of Gopane, their court records have been kept for decades even before he was born.

⁵³ Woodman G 'Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria' in Allott A& Woodman G (eds) *People's Law and State Law: the Bellagio Papers* (1985) 153-7.

⁵⁴ Unreported Bahurutshe Ba Ga Moiloa Tribal Court Dinokana Case No. 3/1994.

the claimant. The claimant claimed the house which belonged to her deceased sister on the ground that there was no marriage between her sister and the defendant who played no role in her life and towards her burial. The chief's court granted the house to the defendant but also ruled that he must refund the burial expenses of his late wife to the claimant which is a rule of customary law. The decision of the court was very contextual and in this case it was in the context of state law applicable in the circumstance of the case and had precedent over the applicable customary norm based on the nature of the marriage of the deceased.

Another vital challenge is the pressure to conform to state institutions and procedures felt by lay judges. For the chiefs, the pressure was in the form of a desire to live up to the magistrates' standards and this influenced how they applied customary law in cases before them. One of the chiefs admits that he applies the Roman-Dutch law in certain cases even though customary law also covers the particular issue to protect himself should the matter be appealed to the magistrate court. The chief would therefore address issues in ways that the magistrate will not fault their decision. He explained that to aid them in their application of the Roman-Dutch law, they source advice from their locals who are lawyers and magistrates and they sometimes try to integrate the advice they receive with the values of their customary law. For instance, in the area of damages, he explained that they apply the Roman-Dutch law on the basis of *Ubuntu* to ensure that the parties are reconciled at the end of the adjudication. In his words, 'I follow the rules of our Country. I still use the rules according to our Constitution but together with the customary laws.' The exercise of discretion here alters the content of living customary law even though it may incorporate Constitutional standards.

Even though the pressure might be real or imagined, it does affect how the judge/chief ascertains customary law and such pressures can defeat the benefit of having a judge versed in the applicable customary law.

Customary court judges are themselves legal practitioners and are not under such pressures.⁵⁵ The only lay judge (retired) interviewed for the courts of lower jurisdiction in the

⁵⁵ Besides, the office of the principal inspector of customary courts in the FCT has statutory responsibilities to ensure that the courts operate credibly and efficiently and it serves as a check on the courts. Where complaints are received with respect to a judge's credibility and, or competence, the inspectorate might withdraw the particular case from the judge or review the court proceedings and judgment or advise that the complaints can be addressed by the appellate court on appeal. See Section 42 and 43 of the Customary Court Act.

FCT exhibited this type of pressure. He discountenanced his knowledge of the applicable customary law for the evidence put before him because he felt bound by the evidence led and by the duty not to descend into the arena of the dispute as an impartial arbiter. He utilised assessors⁵⁶ and chiefs who were custodians of the customary laws to resolve contradictions in the evidence of the parties. He clearly admits to being bound by precedent that conflicts with credible evidence of customary norms presented before him. He subjected all customary laws he applied to the repugnancy and public policy test. Where the customary rules on certain issues were not very clear, he exercised discretion in taking a position for the sake of legal certainty. The point here is that the pressure to conform to procedures of state institutions exists and they impede the ascertainment and application of living customary law by lay judges who are coopted into the formal court structure based on the reason of their being versed in customary law and this pressure threatens the basis of their cooption.

7.3.1.5 *The engagement of lawyers*

The participation of lawyers in the lower courts has its range of impact on how judges exercise discretion in the ascertainment and application of customary law. Legal practitioners have rights of audience in customary courts in the FCT.⁵⁷ There are different instances of how the representation of litigants or the lack of it by legal practitioners aid how the courts exercise discretion in the ascertainment and application of living customary law.

Where parties appear without legal representation, the court has tried to assist the litigants by seeking clarifications on knotty issues or requesting for further evidence where it perceives the need for such and issuing subpoenas to witnesses suggested by the parties. This is done despite the adversarial system of adjudication in Nigeria in which the judges are not actively involved in the trial, such as in the case of *Dorcas Adamu v Adamu Garba*⁵⁸ where neither party was represented by counsel and the court offered direction to both sides. Nonetheless, the judges do not want to be seen as being untowardly interested in the case and may not offer as much assistance as needed by the litigants who would be left on their own and

⁵⁶ Which at that time were utilised by area courts.

⁵⁷ Section 21 of the Act.

⁵⁸ Unreported FCT/CC/YAN/CV/31/2013.

may not present sufficient evidence before the court on the content of the applicable customary law.

However helpful the court may be to the parties, there are instances where a party not represented by counsel is no match for the adroitness of the counsel on the other side, such as the case of *Rifkat Dogo v Yuana Musa*⁵⁹ discussed under 6.2.2.3 in chapter six. Here, the plaintiff sought to claim the property left behind by her late father under the Gbagyi native law and custom as his only child from the defendant. The defendant is not related to her father but claimed that the property had been given to his father by the plaintiff's father before his demise and he inherited same from his father. The crux of the matter was Gbagyi native law and custom on succession and whether it allows a deceased to distribute his property before his death and if such distribution can be rescinded by his heirs. The defendant's counsel however submitted a written address and formulated four issues for determination and relied on several decided cases and provisions of the Evidence Act. He urged the court to strike out the plaintiff's claim which it did. The plaintiff in the presentation of her evidence was no match for the defendant's counsel.

A good instance of where both parties were each represented by counsel is the case of *Ukauwa & Ors v Chineye & Ors*⁶⁰ where customary law was proved through the evidence of the traditional ruler and other witnesses who were duly cross examined.

In South Africa, legal practitioners have no right of audience in the chiefs and headmen courts but can appear in magistrate courts. Their lack of appearance preserves the simple procedures in the chiefs and headmen's court.

Parties on appeal to the magistrate court engage legal practitioners who help to channel the cases more in line with the procedures of the court than the litigants would achieve because of the rules of evidence and this aids the magistrates since the court procedures are Roman-Dutch/Common law.⁶¹ As is the practice in the customary courts, it is vital to note that at the commencement of an appeal at the magistrate court, the court explains to the parties

⁵⁹Unreported FCT/CCK/CV19/2010.

⁶⁰Unreported FCT/CC/GWA/CV/13/2011.

⁶¹Based on interviews conducted.

what the appeal is all about and the procedures even though this is more carefully done in the magistrate courts.

Unlike the situation in the customary courts,⁶² the magistrate also explains to the litigants their rights to engage the services of a legal practitioner or if they lack the funds to do so, their options to apply for legal aid either at the Legal Aid South Africa or the law clinic at the North West University as was done in the case *Ontibili Mokobata v Lesomo Mokobata*.⁶³ The purpose for this is to enable a thorough presentation of evidence including the content of the applicable customary law since the cases are heard *denovo* on appeal.

Where the parties choose not to be represented by legal practitioners, the magistrates carefully explain to them in simple and straight forward terms what they are expected to do at every stage and this helps in the presentation of their cases and evidence of the customary norms they assert. This was demonstrated in the case of *Mongae Tiro V Sebogodi Israel Bahurutshe*.⁶⁴ The court's assistance is restricted to procedure. However where only one party is represented by a legal practitioner, the litigant would usually not be a match for the trained lawyer in the magistrate court as in the case of *DitilePitso v Mogami Modiri*.⁶⁵

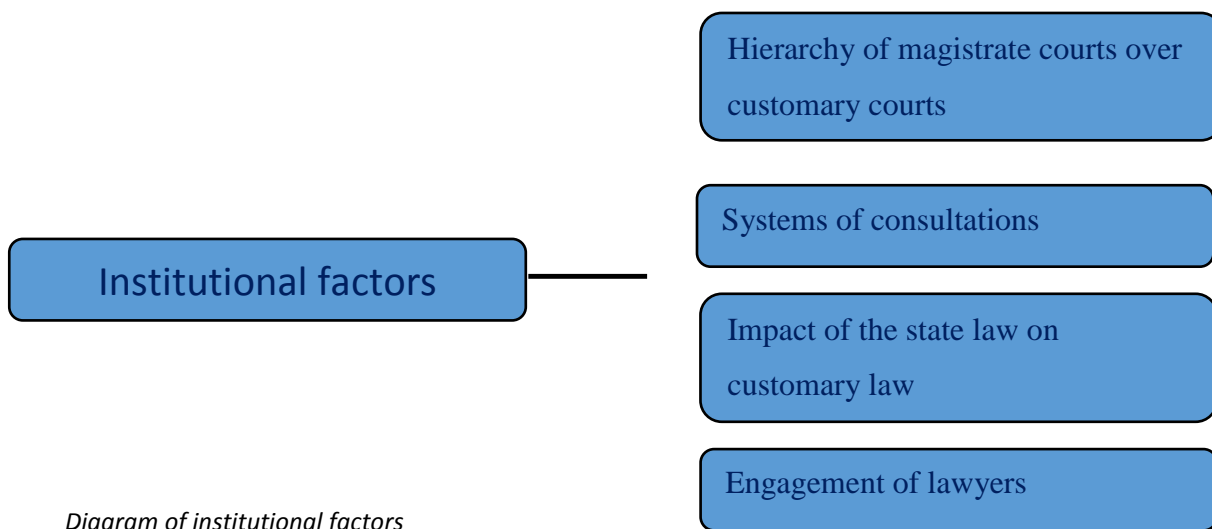


Diagram of institutional factors

⁶² Even though sometimes the customary court judge may advise the litigant to get legal representation without any information of how they can be financially aided to do so.

⁶³ Unreported File No. 81/30381 Lehurutshe Magistrate Court. In *Botlholo Motswamasimo v Moholo Gadifele* Unreported Chief's Court Dinokana Case No. 16/2010, the defendant was represented by the Legal Aid Board South Africa.

⁶⁴ Unreported Ba Ga Gopane Tribal Court Case No. 15/2003.

⁶⁵ Unreported Dinokana Chiefs Court Case No. 08/2003.

7.3.1.6 *Summary*

In summary, the institutional factors that influence how the judges exercise discretion in the ascertainment and application of customary law are exposure to customary law, hierarchy of magistrate courts over customary courts, systems of consultations, impact of the state law on customary law, and the engagement of lawyers. While the different form of exposures do not sufficiently equip the judges in the adjudication of customary law matters, they do not on their own determine how the judges fare because they must be juxtaposed with other factors discussed in this chapter.

The chiefs and headmen courts are well versed in their respective customary laws and even where they are deficient, the systems of consultations adopted by the courts are conducive to the ascertainment (where necessary) and application of living customary law. However, the impact of Western laws over customary law, the hierarchy of magistrate courts over the chiefs and headmen courts, and the pressures felt by these courts to conform to the expectations of the magistrate courts impede the ascertainment and application of living customary law.

The systems of consultations adopted by the customary courts and the magistrate courts enhance the exercise of the judges' discretion towards the ascertainment and application of customary law by enabling the presentation of credible evidence before the court but these systems are not without a few concerns. Both judges of the customary courts and the magistrates interviewed state that the involvement of legal practitioners aids in the presentation of cases and invariably evidence on the content of customary law in courts but where a legal practitioner is not engaged by one of the parties, the party is put to a disadvantage and this may affect the ascertainment and application of living customary law.

7.3.2 Substantive factors

These factors go to the substance of the knowledge of, or content of the law that one way or the other, impact on how judges exercise discretion in the ascertainment and application of customary law. These factors include gaps and consideration for legal certainty, constitutional compliance and the notion of justice, and the need for development of customary law.

7.3.2.1 *On Gaps and consideration for legal certainty*

In Nigeria, all the judges admit that consideration for achieving certainty would determine how they exercise discretion in ascertaining and applying customary law. They would ascertain and apply a version or fill up gaps in the face of little or no evidence on the content of the living norm to achieve justice based on conscience and in line with 'natural justice', based on the inherent powers of the court to be exercised 'judiciously and judicially'.

In South Africa, a magistrate admits that the desire to achieve legal certainty would influence how he exercises his discretion in ascertaining and applying customary law. Another magistrate however differs and states that the circumstances of each case are treated uniquely. They may exercise discretion with respect to what versions of customary law to employ using rules of evidence but would not for instance, fill in gaps in customary law in order to address the issues before the court.⁶⁶

A chief insisted that there are no gaps in customary law as it covers everything. However, in certain instances, the chief may fill up what appears to be gaps. In such instances, he may listen to the headmen's opinion but the final decision is his which he discharges within the confinement of customary law. In the case of *Patricia Nazo V Mogami Moeng*⁶⁷ the records indicate different positions taken by different members of the council with respect to what should be done in the circumstance of the case, and the chief's final decision which was distinct from the different positions of the council members. The chief explained that he has never had to outrightly come up with rules outside customary law to address situations before him as he is always guided by the people's practices.

Another chief explained that a defined norm on an issue is collectively arrived at from the inputs of the elders as well as members of the traditional council from the different clans. This is in order to understand the views of the elders and all members of the community with respect to what is acceptable to the community. He however further explained that he then refers the matter to the magistrate because they are higher in hierarchy and their judgements are appealed to the magistrate courts. He believes that the magistrates will come up with

⁶⁶Based on interviews conducted.

⁶⁷Decided by the Barolong Boo Ratshidi Tribal Authority Mahikeng No Case File number was cited but obtained from the magistrate court.

'better legal answers' and bring the customary norm in line with the constitution. Subjecting all these inputs to the magistrate's discretion therefore defeats the conceptualisation of customary law as deriving legitimacy from the people unless the magistrate's discretion incorporates the values of the customary norms.

According to another chief, where there is a gap i.e. where the customary law does not particularly provide for the details in the circumstances before him, he would fill up the gap, with the Constitution. He further explained that where the content of customary law is not so clear, he would import provision from applicable statutes. A traditional ruler in the chief's council however explained that in cases of gaps, the elders rely on their reasoning and come to agreement as to what to do and they do this often without difficulty. He further explained that they will apply their customary law over a judgement of the high court that contradicts their customary law. This point clearly contradicts the chief's position but then, the chief did explain at the outset of the interview that he was still new as a chief and leans on the counsel of his elders, and this goes to show that the role of the council of elders is integral to the ascertainment of living customary law where necessary, and in its application. The reliance of the chiefs on and seeming acceptance of the magistrate courts also poses a challenge that will impede ascertaining and applying of customary law by the chiefs and headmen's courts.

7.3.2.2. *Constitutional compliance and the notion of justice*

Constitutional compliance and the notion of justice is a factor that influences how judges exercise discretion in the ascertaining and applying customary law even though it is done differently in certain details by the different court types in the two jurisdictions. This factor is manifested in different forms discussed below.

Despite the Supreme Court judgement that customary law should now be gauged against Constitutional compliance rather than the repugnancy clause in Nigeria,⁶⁸ customary court judges still subject customary norms to repugnancy standards of equity, natural justice and good conscience as a basis for the exercise of discretion. The reason for this may be that the provisions of both the Customary Court Act and the rules of court still provide for the

⁶⁸In *Agbai v Okogbue* (1991) 7 NWLR (Pt.204) 391.

application of the repugnancy test which is the standard of natural justice, equity and good conscience.⁶⁹

The counterpart to section 18(4) of the Evidence Act can be found in Section 16 (a) of Federal Capital Territory Customary Court Act and may be described as the compatibility test. According to the provision, a custom shall not be enforced by courts if it is directly incompatible, or can be implied to be incompatible with any written law in force.⁷⁰

The customary courts have avoided unnecessary reliance on procedures and instead focused on the attainment of justice. This was illustrated in the case of *Ann Okekeocha v Chuks Okekeocha & Ors.*⁷¹ Here, the members of the community associations, who were to testify on the applicable customary law of succession with respect to whether sons of the deceased were the rightful heir to the deceased properties and not the spouse, were reluctant to come and testify in court for some personal reasons. Based on the plaintiff's counsel's information that if summoned they would be hostile, which may affect the content of their testimony with respect to the content of the applicable customary law, the court willingly granted several adjournments until one of them willingly came to testify in court and gave evidence of the content of the applicable customary law. Another notion of justice utilised in the customary court is the consideration for global standards on issues such as the call for the prohibition of Female Genital Mutilation.⁷²

According to the magistrates, the exercise of their discretion in the ascertainment and application of customary law will be determined by humaneness, justice and constitutional compliance and would therefore refrain from applying ascertained norms that violate these principles.⁷³ For instance, they would not apply ascertained customary norms that ignore the plight of widows and the best interest of children who are sidelined in favour of male relatives

⁶⁹Order 28 of the Customary Court (Civil Procedure) Rules 2007 and section 16 (a) of the Act.

⁷⁰Charles Mwalimu *The Nigerian Legal System* (2005) 119. See Elias T O *Ground work of Nigerian Law* (1954). According to Elias, these standards are more appropriate to African customary law as opposed to the seven basic standards utilised in English courts for English laws as indicated by Blackstone⁷⁰ and Allen⁷⁰ and these constitute 'antiquity, certainty, reasonableness, continuance, peaceable enjoyment, obligatoriness and consistency'. Mwalimu explained Elias's position as a bid to provide a less stringent approach to proving customary law in Nigeria than in England since Customary law in Nigeria is a crux of its legal system while for England, its customs were just 'mere local variations of general English Law'.

⁷¹Unreported FCT/CC/NYA/CV/008/2012 FCT.

⁷²Based on interviews conducted.

⁷³Based on interviews conducted.

in succession matters.⁷⁴ They would also not apply practices such as *Ukuthwala*⁷⁵ because they violate constitutional right to dignity.⁷⁶ Magistrates are, however, impeded in exercising discretion in favour of widows with respect to succession where the property involved is in the village and subject to customary rules.⁷⁷

The chiefs give consideration to constitutional provisions in the application of customary law but it is not known how often this is done. One of the chiefs states in his own words that ‘I follow the rules of our Country. I still use the rules according to our Constitution but together with the customary laws.’

Of all the records of proceedings analysed at the chiefs and headmen’s courts, there were hardly any that revealed an engagement with the ascertainment and application of customary law. Rather, the records reveal the claims and evidence through the testimonies of the parties and their witnesses and the court’s judgement. No doubt, the chiefs and headmen as well as their councilors already know the applicable customary law and did not need to ascertain them. Where there is any uncertainty, deliberations are done outside the sittings and decisions are arrived at and pronounced in court.

Many times, the issues before the magistrate courts on appeal from the chiefs and headmen courts are not with respect to whether living customary law applied was ascertained but are in regards to fairness and whether in the circumstance, justice was attained. In such instances, the magistrate would measure the appropriateness of the decision which ordinarily is based on the applicable customary law. Usually where the magistrate holds that the decision of the chief and headmen court is not fair, the underlying basis is its complying with Constitutional standards, for instance, the principle of equality regarding succession that excludes the widow and her children and brings in a male relative. In the case of *Tlogelang Mosagale V Nkaki Mooketsi*⁷⁸ where the appellant brought a claim for cattle against the defendant, the defendant

⁷⁴ This change must have come about in the current constitutional dispensation.

⁷⁵ ‘Ukuthwala is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to agree to marriage.’ Available at http://www.gov.za/sites/www.gov.za/files/speech_docs/ukuthwala.pdf (accessed on 09/03/2017).

⁷⁶ Section 10 1996 Constitution.

⁷⁷ Based on interviews conducted.

⁷⁸ Unreported Case No. 2003/10/07. See also *Tlogelang Mosagale v Nkaki Mooketsi* Magistrate Court Lehurutshe case no. 18/03.

who was the respondent on appeal to the magistrate court relied on the principle of male primogeniture to state that the appellant being a woman, had no right to bring a claim on her deceased father's estate. The magistrate court, relying on Constitutional provision of equality and the case of *Mthenbu v Letsela*⁷⁹ held that the appellant though a woman could make such a claim but held that under customary law, the respondent had failed to present evidence that she had the authority of other heirs to bring such a claim in court and dismissed her appeal on lack of *locus standi* to institute the case.

Some of the judges of the customary courts admit that they exercise discretion in the ascertainment and application of customary law for the sake of achieving equity based on conscience in the circumstances of a case by not dwelling on the custom which may not have been presented in evidence before the court, especially if both parties are ignorant of the custom and do not actually bother about it. In this circumstance, they would thus exercise their discretion by applying any rule they think is best in the circumstance if the basis of their discretion is not outrageous and the circumstances of the case is sufficiently grave, having in mind the general principles of law. This is supported by the rules of court which provide that in the absence of any provision by the rules on an issue, the judges should utilise the 'rules of the principles of natural justice, equity and good conscience'.⁸⁰

Some judges admit that a wide range of discretion is bestowed on the judge in applying the repugnancy test. This application is not only based on a Western conception of law but on a conception of law based on the customary law of the particular judge which might be foreign to the applicable customary law in a particular case. It would therefore be better if the people whose customary law is being considered are involved and their views consulted where it is necessary to develop the applicable customary law since this will amount to developing the customary law.

7.3.2.3 *The need for development of customary law*

This is peculiar to South Africa where the exercise of discretion in ascertaining and applying customary law is also influenced by the need to develop it based on the Constitutional

⁷⁹Supra.

⁸⁰ Order 28 rule 1.

injunction.⁸¹ It is imperative that living customary law is ascertained first before development is embarked upon. Magistrates view developing customary law to mean to ‘enhance it a bit’ to bring it in line with the Constitution. They believe that judges of higher courts may take drastic measures and considerably alter the customary norm ascertained to be in line with the Constitution but they do not have the power to do so because they are merely courts of summary jurisdiction.⁸²

The chiefs and headmen’s courts on the other hand handle this differently. They have embarked on developments of customary law to bring it in line with statutory law. A good example is where the customary rule of lashing usually ordered by the chief on a boy who misbehaves⁸³ was deliberately changed as a result of the promulgation of the statutory law against corporal punishment to bring it in line with the statute.⁸⁴ Now, parents would be invited to administer the punishment on the child and where they are not available, the chief’s court would determine what steps should be taken in the circumstance, otherwise it would be referred to the police. For instance in the case of *Semakaleng Sophie Molokwane v Modise Molokwane Bahurutshe*,⁸⁵ the chief refrained from the councilors’ order that the defendant be lashed for refusing to return the plaintiff’s cattle and goats. The chief instead, ordered a refund of three cows, five goats and payment of council fees as well as charged fees.

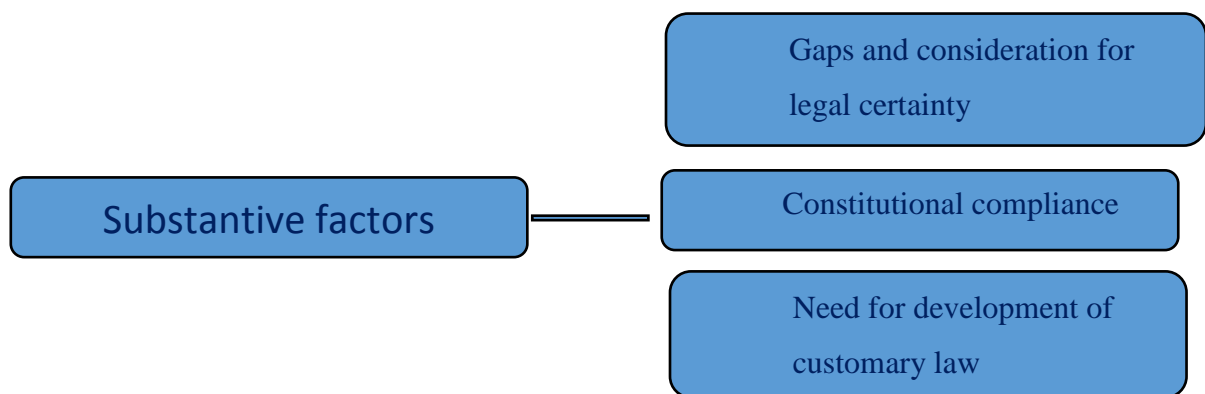


Diagram of substantive factors

⁸¹Section 39 (20 1996 Constitution.

⁸²Based on interviews conducted.

⁸³As In the case of *Lesego Diutlwileng v Tshotlego Lebelwane* Unreported Bahurutshe Ba Ga Gopane Tribal Court Case No. 10/1996.

⁸⁴Abolition of Corporal Punishment Act.

⁸⁵Unreported Ba Ga Gopane Tribal Court Case No. 6/2010

7.3.2.4 *Summary*

The substantive factors discussed above include gaps and consideration for legal certainty, constitutional compliance and the notion of justice, and the need for development of customary law. It is clear that discretion is exercised by the judges at the ascertainment and application stages because what is ascertained may not be applied if it fails to meet constitutional and other standards such as the repugnancy standards and standards based on other notions of justice. How the chiefs' and headmen's courts fill up gaps involves the participation of the elders and people of the community and will enhance the application of living norms acceptable to the community. However, their referral to the magistrate courts and the utilization of statutes and the Constitution infringes on the domain of customary law with respect to how its rules are generated and will impede the ascertainment and application of living customary law. While the path taken by the customary courts may achieve justice in the circumstances of the case, the applied rules may be foreign to the applicable customary law thereby making the justice achieved to be relative. While gauging customary law against Constitutional and other standards, it is vital that living customary law is first ascertained and then developed where necessary with consideration of its values.

7.3.3 **Procedural factors**

These factors are connected to the rules and procedures applied in the courts in the process of ascertaining and applying customary law and are basically centred on how courts resolve evidential contradictions before them.

7.3.3.1 *Resolution of contradictions in evidence*

A number of factors determine how judges, magistrates and chiefs resolve evidential contradictions in Nigeria and South Africa with respect to ascertaining and applying customary law. Generally, the exercise of discretion by the judges in this determination is based on the evidential rule of 'he who asserts must prove' and on a balance of probabilities whether or not they are clearly stated to be based on the law of evidence. Even though the judges of the customary courts are careful not to mention the rules of evidence, they are consciously applied

in magistrate courts but not necessarily so in the chiefs and headmen courts.⁸⁶ Evidential contradictions are resolved in diverse ways by either giving considerations to a number of issues which generally confirm the principles of evidence, or by the misapplication of the principles of evidence. While some of the considerations will enhance the ascertainment and application of living customary law, others will not.

The diverse issues considered by judges come in different forms and this confirms that not only do judges exercise discretion in this process, the sphere of their discretion is wide. However, the thesis asserts that the exercise of discretion is only justifiable when it is done within the confines of the rules, and it leads to the ascertainment of living customary law.

For Nigeria, a judge states that when he is faced with contradictory evidence of the content of customary law from both parties, he would accept the version before him that is most aligned with current undisputed facts before the dispute arose.⁸⁷ Another judge analyzes the authenticity of contradictory evidence of witnesses based on how they fare under cross examination. Some judges have preference for evidence presented before the court by members of a community who are bound by the custom over texts and this would more possibly lead to ascertainment and application of living customary law. Another would, where the evidence of the experts brought in by the parties are in contradiction, refer to texts to resolve the contradiction and would accept the version that agrees with the text. Where there are no texts, the registrar⁸⁸ would be instructed to search for and identify the chief of the particular community whose customary law is being considered to come as an independent witness. A witness summons would be issued to the chief to testify on the contents of the customary law on the subject in issue. This testimony will be accepted if it is not in conflict with public policy and if it is convincing.

⁸⁶ This confirms Dlamini's findings in his research on the chiefs' courts in Kwazulu where he explained that it applies simple rules of evidence and does not subject its procedures to technical rules of evidence. See Dlamini CRB 'The Role Of Chiefs In The Administration Of Justice In Kwazulu' A thesis submitted in partial fulfillment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria 1988 119. This situation is similar in the courts research in this thesis.

⁸⁷ He relied on the case of *Kojo v Bonsie* (1957) 1 WLR 1223 at 1226. A Nigerian case that got to the House of Lords where the court held that for instance in land ownership disputes where both parties present undisputable evidence of ownership to the land under their applicable customary law, the court would consider current evidence of undisputed possession prior to the dispute and without force as a determining factor of ownership.

⁸⁸ See section 9 of the Customary Court Act. Their responsibilities are administrative with respect to the issue of witness summons to testify on the content of customary law.

The order of preference for a judge is precedents, texts and then independent witnesses. The reliance on text and precedence over the evidence of independent witnesses will more likely influence discretion away from the ascertainment and application of living customary law unless these sources clearly represent the living customary law of the community as discussed in previous chapters.⁸⁹

Judges have failed to ascertain and apply customary law by going outside the rules of evidence under circumstances that can be best described as incompetence, and, a dearth in the knowledge of and the conceptualization of customary law. One of such instance is where principles of Common law and statutory provisions are applied in place of the applicable customary law. In the case of *Rifkat Dogo v Yuana Musa*,⁹⁰ one of the issues to be determined was whether under Gbagyi customary law, a person can make an oral will. The court held that the plaintiff's father made a valid oral will in the absence of any evidence of what constitutes a valid will and the vitiating factors to a valid will under customary law, and specifically Gbagyi customary law before the court. The court held that a testator has absolute freedom of testamentary capacity to bequeath his estate to either family or stranger in a customary law will while no evidence was led on this. The court also held that the will was valid because the subject and the beneficiaries were specifically identified and referred to the case of *Ayinke v Ibadun*⁹¹ which had nothing to do with Gbagyi customary law. The court clearly relied on principles under common law and statutory law on wills and the cases it referred to were with respect to statutory wills. Hence, no customary law was ascertained and applied here as a result of the judges' blatant misapplication which may have been occasioned by incompetence.

Another dimension to this is the case of *Chinwe Emenalo v Emenalo Oni*.⁹² Here, the petitioner filed for divorce on grounds of physical violence. The court granted the prayer and ordered the return of the dowry by the petitioner even though the respondent did not request it. The court relied on Order 13 r1 of its rules and the case of *Registrar of Marriages v Igbinomwanhia* which held that for a divorce to take place, the dowry must be returned. No

⁸⁹ 3.4.1.1 and 3.4.2.1 in Chapter three, and 4.3.2.1.3 in chapter four.

⁹⁰ Supra. See facts of the case in 7.3.1.5.

⁹¹ (1959) 4FSC 280.

⁹² FCT/CC/CV/DU/16/2010 CC.

evidence was led to prove that the return of dowry was a prerequisite to the dissolution of marriage under the applicable customary law. Despite the petitioner's opposition to the respondent's application for the restoration of his conjugal rights pending the determination of the suit, the court ruled in favour of the respondent without confirming the content of the applicable customary law on the issue.

Another instance is the case of *Shuaibul smaila v Audu Adamu & Ors*⁹³ where the court determined the paternity of the child in favour of the plaintiff without medical evidence based on the slight contradictions in the evidence of the defense witnesses which could simply be credibly explained away. Although the unchallenged evidence by the petitioner's witness was that under the applicable customary law, the child of an unmarried woman belonged to the biological father, there were strong evidence by the respondents claiming that the child belongs to the respondent's husband who conceived the child during the pendency of her marriage which was still subsisting at the time of this case.

These cases clearly indicate a misapplication of discretion by the courts where customary law was not ascertained, where principles of Common law and statutory law were applied, incorrect utilization of precedent, and the application of customary law not supported by the facts of the case. These clearly jeopardize the ascertainment and application of living customary law.

There are instances where though the courts' discretion may be in line with the rules of evidence, no customary law was ascertained and applied to the dispute. For instance, in certain cases, courts have simply accepted contents of customary law presented by petitioners if not contested. One of the judges said about fifty percent of the divorce cases heard in his court are not contested and the other parties do not bother to appear in court. The implication is that in such instances, the judge has before him undisputed evidence of the content of the applicable customary law which may not correctly represent the customary norms of the community but the court accepts it nonetheless because it meets evidential standards.

⁹³Unreported CV/39/2005.

Another instance is illustrated in the case of *Rolf Schneider v Felicia Schneider*⁹⁴ where the court exercised its discretion in dispensing with the ascertainment of customary law with respect to the custody of children because the respondent who is the mother of the children had conceded to all the reliefs sought by the petitioner which included the custody of the children. What the court considered instead was the best interest of the children. Indeed the Customary Court Act does provide that 'In any matter relating to the guardianship of a child, the best interest and welfare of the child shall be the first and paramount consideration'.⁹⁵

All the judges interviewed in the customary courts did indicate that they would give preference to precedents over convincing evidence from the community on the content of the applicable customary law. This is similar to the views of a magistrate in South Africa who explained that his main source of living customary law are judgements from the high courts and the Supreme Court of Appeal. In this instance, the courts reject the primary sources of living customary law, which is the people, for sources derived from institutions established on different jurisprudential foundation of positivism due to the centralist arrangements that elevate sources from such institutions through the principle of judicial precedent as opposed to legal pluralism. The implication is that where such precedents are not reflective of the actual normative practice of the communities, they will not enhance the ascertainment and application of living customary law.

In South Africa, with respect to evidence of members of the community, a magistrate explained that she would give consideration to the evidence of a smart older witness. Magistrates would also not necessarily prefer the evidence of a traditional leader who ordinarily is the custodian of the customs over the evidence of elderly persons. The reason for this is that the elderly person who has lived in that community should know better than the traditional leader who these days are sometimes very young and therefore would not be as well versed in the contents of the customary law and still rely on their uncles for guidance.

⁹⁴Unreported FCT/CC/GWA/CC/03/2008.

⁹⁵The decision of the customary court in this case was however set aside on appeal. This was on the ground that since the supposed union between the parties under customary law was void *abinitio* having been made during the subsistence of the Petitioner's statutory marriage with another woman, the customary court lacked the jurisdiction to hear the matter and grant any relief sought. See *Felicia Ochuola Schneider v Chief Rolf Schneider* Unreported FCT/CCA/CVA/10/2010.

Sometimes they also may not have lived in the community long enough to experience its customary practices. This is crucial as the data obtained from some of the chiefs' courts confirm this.

Magistrates admit to heavy reliance on evidence of witnesses, precedents and assessors because of limited texts on the content of customary law. Sometimes on appeal, the assessors have contradicted the decisions of the chiefs even though they have been satisfied with their decisions many times. The chief's decisions are set aside on a number of occasions not necessarily because the content of the customary law were wrong but because the judgement was against the weight of the evidence before the court based on the content of the customary law ascertained.⁹⁶ With respect to the chiefs' and headmen's courts, their decisions are often times based on common sense steeped in the customs. For instance, the principles of contract in customary law as well as common sense are applied.

Magistrates rely on assessors to resolve conflicts in the evidence related to the content of the applicable customary law but where this is not to their satisfaction, they would absolve the matter on the basis that they are unable to make a finding in the matter. There are also cases where the assessors contradict themselves and were not helpful and the magistrate had to absolve the case. They however also rely on what they view as the most probable of the evidence before them, that which they regard as 'good practice' and as not oppressive. Credibility of the witnesses is also crucial.

It is important to also mention the role of interpreters which may be crucial to the ascertainment and application of customary law. Customary courts endeavour to accommodate some of the languages spoken by parties and their witnesses. For instance, in each of the cases of *Rifkat Dago v Yuana Musa*⁹⁷ and *Haruna Kaye v Yusuf Sarki*,⁹⁸ English, Gbagyi and Hausa languages were spoken in the course of the trial and the court had to provide interpreters for all these languages. However, there are instances where interpreters wrongly interpret integral parts of the testimonies of the witnesses as discussed in chapter six,⁹⁹ thereby placing before

⁹⁶For instance see *Morule v Matlhaku* unreported Case No. 04/2004.

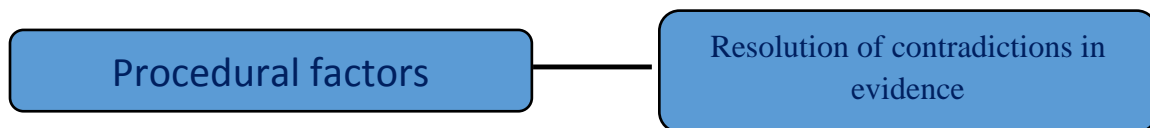
⁹⁷Supra.

⁹⁸Unreported FCT/JD/CC/Kwa/CV.15/11.

⁹⁹See 6.2.1.5.

the court evidence that contradicts the content of the applicable customary law sought to be ascertained and applied.

Evidence are usually not led on the content of customary law before the chiefs and headmen's court and where there are uncertainties with respect to the content, they are addressed in the manners discussed in 7.3.2.1 through consultations.



7.3.3.2 *Summary*

The procedural factors discussed above are connected to how courts resolve evidential contradictions before them. From the discussion in this section, it is not in doubt that judges exercise discretion in their application of the rules and principles of evidence in the proof and application of customary law, and at a wide range. It is also clear that while some evidential considerations are done within the confines of the applicable rules, some are clearly misapplications of the rules of evidence and even of the relevant customary laws and these will not foster the ascertainment and application of living customary law. While evidential considerations applied within the confines of the rules justify the process of ascertainment by the courts and lead to the ascertainment of what is convincing before the court, what is before the court may not necessarily be living customary law. The chapter also disclosed that the dearth in the jurisprudential conceptualization of customary law and the theory of legal pluralism impact on how judges exercise discretion and this leads away from the ascertainment and application of living customary law. In all, these factors are common in the customary courts in Nigeria and the magistrate courts in South Africa. Evidence on the content of customary law is not led in the chiefs and headmen's courts and how they resolve gaps and uncertainties were already discussed in 7.3.2.1 above

7.4 Conclusion

This chapter discussed factors that influence how courts of lower jurisdiction in Nigeria and South Africa ascertain and apply customary law. It discussed the variation of factors which broadly include institutional, substantive and procedural. These factors also featured in the previous chapters on courts of superior jurisdiction and are broadly similar in how they apply to the lower courts in certain ways, such as training and exposure to customary law, gaps and consideration for legal certainty, constitutional compliance and the notion of justice, and the need for development of customary law. They however feature their own distinctiveness in the uniqueness of each lower court, the hierarchy of magistrate courts over customary courts, systems of consultations, impact of the state law on customary law, and the engagement of lawyers.

Other forms of distinctiveness is in how each of the factors engage with the peculiarity of each of the lower courts. In all, the chapter clearly reveals that wide discretion is exercised in the courts in the process of ascertainment and application of customary law, and it is influenced by the range of factors identified under the broad categories. The chapter states that while some of these factors enhance the ascertainment and application of living customary law, some do not. The chapter finds that exposure of the judges to customary law under the different circumstances discussed do not on their own determine how the judges fare and they must be juxtaposed with other factors discussed in this chapter. The chapter also reveals that the dearth in the jurisprudential conceptualization of customary law and the theory of legal pluralism by the judges affect the exercise of the judges' discretion away from living customary law. In all, the factors identified here cover the range of those intrinsic and extraneous to the rules of evidence and court procedures.

PART D
Conclusion

Chapter Eight

Conclusion

8.1 Introduction

This research set out to analyse the process of ascertaining and applying customary law in formal courts in Nigeria and South Africa and how they enable the ascertainment of living customary law, and to identify factors that inform the judge's determination and application of living customary law. To address these, the research examined theories on the conceptualisation of customary law and its regulation in a formal state structure, analysed how customary law which operates under legal pluralism fits into a positivistic centralised legal system, and reviewed the central role of judicial discretion in the ascertainment and application of customary law. The positivistic doctrine of judicial discretion was examined against the backdrop of legal realism and formalism as they affect the application of customary law. It established that judges do in fact exercise discretion in this process when applying rules of evidence and procedure, as well as customary norms and that judicial versions of customary law are justified only when they ascertain living customary law.

The thesis discovered answers to its research question of '[W]hat factors influence the judge's determination and application of living customary law?' by identifying factors that are both intrinsic and extraneous to the court and its rules and procedures. These influence how discretion is exercised by the judge in ascertaining and applying living customary law.

The factors are institutional, substantive, procedural, socio-economic and political, and can lead the court's exercise of discretion either towards or away from ascertaining and applying living customary law. This finding agrees with Kronman's view that judicial discretion involves an:

[E]lement of free creativity, of interpretative freedom, in the adjudicative process which is left over, so to speak, after one has taken account of all the rules that might conceivably bear on the case at hand.¹

¹Kronman A T 'The problem of judicial discretion' (1986) 1063 FSS available at http://digitalcommons.law.yale.edu/fss_papers/1063 (accessed on 11/01/2017) 481.

No single factor necessarily influences how judges ascertain and apply customary law. Multiple factors typically do. Thus, this research asserts that a judge's exercise of judicial discretion is only justifiable where it aids the ascertainment and application of living customary law, or where it is developed to comply with the standards of justice following a consideration of the acceptable non-harmful practices of a given community.

The first chapter laid out the background, purpose, scope and research methodology of this research. Chapter two sketched the conceptual framework of the research. It argued that judges exercise mild or wide discretion influenced by factors that could lead them to or away from ascertaining and applying living customary law. This chapter specifically addressed the sub question of '[D]oes the doctrine of judicial discretion under the theory of positivism justify judicial versions of customary law?' Here, the thesis asserts that the only ground on which the exercise of judicial discretion can justify judicial versions of customary law is if it conforms to the contents of the applicable living customary law and standards of justice explained above. It argued that the exercise of discretion by the judges must ensure that the status of customary law as law is preserved.

Chapters three and four specifically addressed the sub question of '[W]hat processes do formal courts adopt for ascertaining and applying customary law and how do these processes enable the ascertainment of living customary law?' These chapters elaborately spelt out the processes utilised by the courts and identified challenges in the processes adopted in both countries. The thesis found that this process is regulated by laws of evidence, court rules and court laws in both countries which provide that customary law will be ascertained and applied through judicial notice and proof as facts through evidence. These chapters addressed the concepts of judicial notice and proof, which are the two ways of ascertaining and applying customary law by formal courts. They also discussed the legal framework and the challenges that frustrate the process of ascertaining living customary law and the utilization of different methods of ascertainment when used as aids by the courts while taking judicial notice or when requiring proof as facts through evidence.

Chapters five, six and seven answered the main research question of '[What] factors influence the judge's determination and application of living customary law?' Several factors

where identified under broad categories for both courts of superior jurisdiction and courts of lower jurisdiction in both Nigeria and South Africa. The factors identified are intrinsic and extraneous to the court and its rules and procedures. They influence the process of ascertainment and invariably how judicial discretion is exercised. While chapters five and six identified factors for the courts of superior jurisdiction, chapter seven examined how the factors feature in lower courts

Chapter eight therefore commences with linking concepts, with findings on process and factors that impact ascertainment and application of customary law, and then discusses some salient issues from the thesis. It thereafter states the summary of the similarities and differences in the factors identified, and briefly states the summary of factors that influence the ascertainment and application of customary law. The thesis concludes by presenting a model process of ascertainment and application of customary law by the courts, and with concluding remarks.

8.2 Linking concepts, with findings on process and factors that impact ascertainment and application of customary law

The process of ascertainment in Nigeria and South Africa is similar. It is by judicial notice and proof as facts. In applying judicial notice, the rules of evidence give more room for exercise of judicial discretion in Nigeria than they do in South Africa due to its scanty provisions as discussed in chapter three. However, judicial notice was seldom used by Nigerian and South African courts in the cases analysed in this research. This is mainly because official versions of customary laws that capture the many nuanced differences between normative customary practices in a community, clan or even family are not exhaustive. Judicial notice was used in relation to broad and common principles, such as male primogeniture. Where used, it was mainly in relation to the official customary law and it was assumed to be the current normative practice of the communities in the dispute and was developed without any reference to what the living norm might be. In this regard, the provisions of the old Evidence Act of Nigeria offer a better way of proving customary law through judicial notice. It required a degree of proof² that

²Already discussed under 3.4.1.1 in chapter three.

justifies the use of judicial notice and confines such use to laid down rules and principles. This is what currently obtains in South Africa. This thesis recommends that what is sought to be judicially noticed should first be affirmed by the subject community. This ensures that a customary norm derives validity from the community and not from state institutions. It ensures that living law is taken into consideration and that however it is developed, it will be practically relevant to the community.

The very same methods that facilitate judicial ascertainment of customary law can also aid the ascertainment of living customary law. However, they are not without problems that could impede ascertaining living customary law.³ Where for instance the approach or processes employed to ascertain is only suitable to ascertain written customary law, where the written law is markedly different from the living version, the result will be a distortion or official version of customary law that deviates from the living version. Such distortions can be exacerbated if courts, when exercising discretion, are led by some of the intrinsic or extrinsic factors identified in this research, into developing the official version further away from the lived normative practices in the relevant community.⁴

Ascertaining customary law as facts that must be led in evidence is more frequently utilised in both countries and is done differently by specialized customary law courts and by regular courts. For the former, customary rules of procedure are utilised in South Africa by the chiefs and headmen's court and in Nigeria by customary courts though the source of the rules utilised in Nigeria is questioned. Since the courts of chiefs and headmen are versed and knowledgeable in the customary law of their locale, they do not need to ascertain customary law. However, they confer together to fill up gaps, confirm grey areas and agree on what is just in the context of the circumstances of each case. The discretion they exercise in this regard accords with the flexibility imbedded in the very nature of customary law adjudication, which focuses on the context and conciliatory justice that accords with practical realities and norms in

³ See 4.3.2 under chapter four.

⁴ Adeyemi Ajani agrees that the exercise of judicial discretion by courts in Nigeria is determined by factors beyond the black letter of the law. Ajani B A 'The nature of judicial process in Anglo-Nigerian jurisprudence' (2016) available at SSRN: <https://ssrn.com/abstract=2742586> or <http://dx.doi.org/10.2139/ssrn.2742586> (accessed on 14/01/2016) 3 & 6.

the community. This approach engenders customary law ascertainment (where applicable) and application. This is not exactly so for customary courts in Nigeria because their judges are lawyers and are not necessarily knowledgeable in the contents of applicable customary law before them, and the operation of the court does not fully foster this. For the regular courts, statutory rules and principles of evidence and procedure are utilised. Though the customary court of appeal in Nigeria falls under the category of customary courts, rules of evidence apply and to this extent, it operates in similar fashion as the latter.

The conceptual and processual issues that have been raised in chapters two, three and four as well as the factors that influence discretion raise salient issues that are further addressed in this chapter.

8.3 Salient issues

8.3.1 Undue adherence to court's rules and procedures

While the ascertainment of customary law is subject to procedural rules, compliance to these rules need not be rigid. The rules should be relaxed where that would aid ascertainment without compromising the nature and peculiarity of a customary law system. The Court of Appeal Rules in order 20 rule 2 provides that 'The Court may direct a departure from the court rules in any way this is required in the interest of justice'. Bone and Cover have long challenged a uniform application of a procedural rule across board 'regardless of the substantive stakes'.⁵ In line with this view, Cover urges flexibility in applying procedural rules in order 'to serve different substantive interests',⁶ and has cautioned that they should only be utilised where they 'successfully enforce the substantive policies at stake'.

In customary law adjudication, especially by the customary courts in Nigeria, there are instances of strict adherence to procedural rules which have impeded the ascertainment of customary law. In *Rifkat Dogo v Yuana Musa*,⁷ the appellant had a cogent ground for

⁵Bone R G 'Securing the normative foundation of litigation reform' (1975) 86 BULR 1156. Bone referring to Robert M Clover 'For James Wm. Moore: Reflections on a reading of the rules' 84 Y LJ 718.

⁶Ibid.

⁷Unreported CCA/CVA/9/2011. Discussed under 6.2.2.3 in chapter six and 7.3.1.5 in chapter seven.

challenging the content of the applicable customary law adopted by the judge, but the appeal was thrown out by the FCT Customary Court of Appeal because the appellant's counsel did not give reasons for filing a late appeal. This was clearly a technicality. Under section 19 (2) of the Customary Court Act, the Customary Court of Appeal is enjoined to exercise its appellate powers with a view to achieving 'substantive justice without undue regard to technicalities'.⁸ The court clearly did not comply with this provision. The court ought to have entertained the appellant's substantive grounds challenging the content of the customary law applied by the court a quo by giving the appellant a chance to make oral explanation for the late filing. By failing to do this, the court missed the chance to ascertain the true content of the applicable customary law in the consideration of the lower court's judgement.⁹

The customary court rules provide that the underlying aim of litigation before the court is substantive justice without undue regard for procedures.¹⁰ Thus, certain rules of evidence are excluded from application to customary courts. It does not make logical sense that the Customary Court of Appeal will follow procedure very strictly on appeal from customary courts where strict rules of procedure and evidence do not apply, especially when the category of the parties are the same. It defeats the cause of justice when adherence to procedural rules precludes a consideration of the substantive matter in such a case. Indiscriminate adherence to procedures in cases litigated before customary courts is capable of impeding the exercise of judicial discretion in addressing the substance of the customary law that is to be ascertained. The overarching objective in such cases must be substantive justice.

Indeed, section 24 of the Customary Court Act emphasizes substantive justice. It empowers the court to require any person present in court to give evidence where it believes such evidence may be relevant to, for example, determining the content of the applicable

⁸ The Act also seeks to promote the attainment of reconciliatory justice - a value known to customary law - by providing that in all civil matters, the 'customary court may promote reconciliation among the parties thereto and encourage and facilitate amicable settlement thereof'. See Section 15 (2) of the Act.

⁹ This is especially so since order 7 rule 15 Customary Court of Appeal Rules 1996 allows for additional evidence on appeal either by the customary court of appeal or by the customary court. This would give the appellant the opportunity to have the appropriate customary law ascertained. The court is willing to grant concession to the litigant not represented by counsel under order 5 rule 10 to 'waive compliance ... in so far as they relate to the preparation and filling of briefs of argument; either wholly or in part...' This concession appears more serious than application for extension of time and the lapse should not have been penalised in this manner.

¹⁰ Order 11 rule 2.

customary rule. This was done in the case of *Dorcas Adamu v Adamu Garba*.¹¹ In *Ann Okekeocha v Chuks Okekeocha & Ors*,¹² the court ignored procedural rules to issue summons to compel vital witnesses to appear court when it was informed that compelling the witnesses would affect the quality of their testimony on the content of the applicable customary law. It rather agreed to a number of adjournments until such vital witness was prepared to testify in court.

The exercise of discretion to give weight to evidence is not arbitrary but it is to 'discern the course prescribed by law'.¹³ Even though the exercise of discretion on procedural matters is also important, the weight of the substance of the evidence is greater.¹⁴ Chief Justice Marshal had long cautioned that the judge's exercise of discretion in procedural matters should not be exercised to such extent as to 'penalize' the consideration of the substantive rights of the parties on merits.¹⁵ This is so because how judges exercise discretion in procedural matters affects the substantive rights of parties.¹⁶

Kludze, writing on customary law in Ghana, observed differences in the rules and procedures of official and informal courts.¹⁷ He noted in particular a considerable degree of flexibility 'in the rules of customary courts' which lean on 'reconciliation and neighbourliness rather than blind justice'.¹⁸ Such flexibility, notwithstanding the informality of their procedures, has been noted to achieve 'forensic ends' comparable to formal courts.¹⁹ A considerable degree of flexibility and emphasis on reconciliation attends to proceedings of the courts of chiefs and headmen in South Africa than in customary courts in Nigeria, due to the institutional status and the greater levels of formality in procedures in the customary courts.

¹¹Supra discussed under 7.3.1.5 in chapter seven.

¹²Unreported FCT/CC/NYA/CV/008/2012 FCT.

¹³ Spindle R B 'Judicial discretion in Common law courts' (2012) 4.2/3 WLLR 148.

¹⁴Ibid.

¹⁵Ibid at 147-8.

¹⁶Ibid p 147. The judges view discretion as the 'exercise of judicial judgment based on facts and guided by the law or equitable decisions' expressed in the Nigerian case of *UBA Ltd v Stalibau GMBH and co*. KG Justice Nweze JCA as he then was in Oshisanya, I O *An Almanac of Contemporary and Convergent Jurisprudential Restatements* (2015) 445.

¹⁷Kludze AKP 'Evolution of the different regimes of customary law in Ghana within the framework of the principle of stare decisis in Allott A & Woodman G (eds) *People's Law and State Law: the Bellagio Papers* (1985) 102.

¹⁸Ibid.

¹⁹Allott A N, Epstein A L & Gluckman M 'Procedures: Proceedings and evidence in African customary law' in Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) OUP 22.

8.3.2 Engaging the rules of evidence

Judges analyse and weigh evidence to justify their decisions. According to Perry, besides applying applicable principles when adjudicating in a case, it must also be practically possible for the judge to access the uniquely correct answer, and where there is no consensus in the evidence before him//her, to adopt the 'judicial point of view'.²⁰ To adopt a judicial point of view, the 'judge [must] study [the] case carefully, paying close attention to relevant legal standards and legally significant facts...' and must 'be sincerely rational.'²¹

A judge may reach any decision that may seem to him/her to be rational, provided he/she can offer a legally reasonable basis for it, and sincerely considers it the most plausible in the circumstances.²² Only then can there be judicial justification for the decision even though it must be borne in mind that other factors outside the judge's control may also have a bearing on the decision. As much as it depends on the judge, he/she must apply a level of judicial rationality, discreetly working within the ambit of the rules, in order to ascertain the applicable living customary law. In this manner, the majority of the judges in the *Mayelane*²³ case were able to ground their decision on a sound judicial basis. And though the minority judgement could well conform to Perry's proposition, the majority approach was more comprehensive because it went beyond the narrower strictures of the rules of evidence to ensure that

²⁰Perry T D 'Judicial method and the concept of reasoning,' (1969) 80 EIJSPLP 5 & 6.

²¹Hoffmaster B 'Understanding judicial discretion' (1982) 1.1 LPS 39-40.

²² Perry op cit note 20 at 9.

²³Supra. As discussed under 5.2.1.3 in chapter five. Judges must exercise caution in adopting any norms put before them as representing the applicable customary law. Kingdom C J in the case of *Balogun v Oshodi* (1931) 10 NLR 36 at 57 expressed his hesitation to apply a customary practice proved before him as being the practice adopted by a number of people within that community where he is not fully convinced that the custom had evolved. Elias commended this caution due to the consequences of the court's vital role in giving judicial backing to 'alleged' customs. He however stated that the court's hesitation could 'tend towards legal conservatism'. Elias T *Ground Work of Nigerian Law* (1954) 15 -16. As a solution, he advised that the court may apply to the Native Authority for a declaration, which may recommend modifications based on the current circumstance prevailing in the community. In line with the Native Authority (Amendment) Ordinance No. 3 of 1945. This however raises the concern of whether or how the Native Authority's position is censored and validated by the community who are supposed to be the generators of their customary law. Allott had observed the rule of confirming modifications of customs by the community and adopted by the courts. See Allott A N 'The judicial ascertainment of customary law in British Africa' (1957) 20.3 MLR 255-256.

necessary proof of living customary law could be admitted while still working within the broader scope of the court's rules of procedure.

The thesis therefore recommends against an undue reliance on procedures that impede a more thorough ascertainment process. Where what is at stake is a vital customary rule that affects the broader community, the court must go beyond mere compliance with rules that limit its ability to establish the content of the applicable living customary law. The court's approach in *Mayelane*, which allowed epistemological findings to be admitted, generated valuable evidence that strengthened its decision on the content of the applicable customary law.²⁴ The court had to push to the edge of boundaries to request for further evidence regardless that there were evidence of the content of the applicable customary law already before it. The step taken by the Constitutional Court was also informed by the transformation thrust on the court which is explained as being somewhere in between a 'reform' and 'revolution'.²⁵ Though the exercise of discretion by the court in this case was wide, it was within the confines of the applicable rules²⁶

8.3.3 Constitutional recognition and mandate

As pointed out in chapter one, while the Constitution of South Africa expressly recognizes customary law as a distinct source of law, the Nigerian Constitution's recognition is not so explicit. This omission in the Nigerian Constitution explains why customary law remains subservient to the Common law. In South Africa also, there is fiercer resistance to the repugnancy clause than in Nigeria. Nevertheless, the application of customary law is subject to constitutional rights in both countries. In South Africa, there is a clear constitutional mandate for courts to develop customary law in accordance with the bill of rights. This, without doubt,

²⁴ Maurice Pieterse explained that 'constitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity'. Transformative constitutionalism has been explained to include legal culture. See Pieterse M 'What do we mean when we talk about transformative constitutionalism?' (2005) 20.1 SAPL 159. Brickhill J & Leeve Y V 'Transformative constitutionalism- Guiding light or empty slogan' in Price A & Bishop M (2015) AJ 142.

²⁵ Klare K E 'Legal culture and transformative constitutionalism' (1998) 14 SAJHR 150.

²⁶ See rules 20 (1) (c) (v) Rules of the Constitutional Court no. R. 1675 of 2003 which provides that the Constitutional Court may request for additional evidence when necessary 'by way of affidavit or otherwise for the purpose of the appeal'.

was the basis for the radical stance that the courts adopted in *Shilibana*, *Bhe* and *Mayelane*. As a result of this stance, South African courts have consistently premised the development and application of customary law on the bill of rights. However, while the Nigerian Constitution may not expressly provide for development, courts have been alert to constitutional rights restrictions on customary law in certain cases. The question is whether they have attempted some engineering that corrects something flawed in the norm, but keep it close as much as possible to what the people largely accept. The tendency, when they are called upon to ascertain and apply customary law, is to pronounce upon the constitutionality or otherwise, or the repugnancy or otherwise of a customary norm asserted before them. Such pronouncements may in some instances constitute developments on the customary norm, but such are few. In the Nigerian case of *Agbai v. Okogbue*²⁷ Justice Nwokedi JSC, as he then was, stated that:

The doctrine of repugnancy in my view affords the courts the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws. I do not intend to be understood as holding that the courts are there to enact customary laws. When however customary law is confronted by a novel situation, the courts have to consider its application under existing social environment.

South African courts have, in some instances, endeavoured to develop a norm so as to conform it to the constitution while retaining the essential character of the norm.

Customary law is developed with the object of ensuring conformity with constitutional and statutory provisions, and with the repugnancy and public policy tests. Development is also essential to bring it in line with living customary law; and, in accordance with current socio-economic realities of the communities in situations where the customary law is yet to adapt to these realities. Nigerian and South African courts have been unfavourably disposed towards the repugnancy and public policy standard in order to validate customary law in its ascertainment and application because the standards utilised are foreign to customary law concepts. In

²⁷(1991) 7 NWLR (Pt.204) 391

*Mabuza v Mbatha*²⁸, the court regarded the repugnancy and public policy standard as flawed, antithetical to the development of customary law, and therefore irrelevant in South Africa's constitutional dispensation. The court preferred the rule of constitutional compliance. By contrast in Nigeria, though the Supreme Court has held in *Agbai v Okogbue*²⁹ that constitutional compliance replaced the repugnancy clause, some judges still utilise the standards set by the repugnancy and public policy clause. Indeed, in the 2014 judgement of the Supreme Court in the case of *Anekwe v Nweke*,³⁰ the repugnancy test featured greatly as a basis for which the Awka customary norm that disinherited a widow because she had no male child for the deceased was annulled. There may be a political rationality behind this divergence between the two countries. The *Mabuza* case strongly associated the repugnancy and public policy standard to Apartheid, for which there is a concerted effort to move away from. In Nigeria, even though this is associated with colonial repression, such concerted efforts are not that evident and besides, court rules and even the Evidence Act still retain the repugnancy standard notwithstanding calls for discontinuing its use, hence judges still utilise them.³¹

8.3.4 Adversarial system of adjudication

The adversarial system in civil trials determines to an extent how trials are conducted and may influence the process of ascertainment and application of customary law. Comparative law now recognises that most legal systems do not necessarily operate strictly as inquisitorial and adversarial systems but may blend elements of both at different points of a trial.³² The adversarial system presupposes that the parties are in control of the trials and judges play passive roles as impartial umpires.³³ Hence where litigants are unrepresented by counsel, judges feel restrained and refrain from adequately seeking clarification during adjudication lest they be said to have descended into the arena. On the other hand, in the inquisitorial system,

²⁸(1939/01) [2002] ZAWCHC 11;

²⁹Supra

³⁰(2014) LPELR-22697(SC).

³¹See 5.2.2.1.6 for discussions on repugnancy clause.

³²Reimann M 'The progress and failure of comparative law in the second half of the twentieth century' (2002) 50.4 AJCL 677.

³³Damaska M *Evidence Law Adrift* (1997) 74. See also Choo A *Evidence* (4th ed) (2015) 57.

judges control the trial, can call witnesses, put questions to them³⁴ and adequately satisfy whatever enquiry they may have.³⁵

Although the adversarial system requires judicial detachment, Mcwen asserts that this is not entirely the case because judges do show some level of engagement to discover the truth and achieve justice.³⁶ Thus, while both systems may appear to be direct contrasts, in practice, they infuse certain features of each other, with the legal system determining which elements dominate.³⁷ Thus, while Nigeria and South Africa are adversarial systems, judges are not as passive as would be expected in an adversarial system. They sometimes participate during trials by seeking further clarification, requesting further evidence, or by inviting amici, assessors and experts to aid how they exercise discretion in the ascertainment and application of customary law.³⁸ However, judges have also restrained themselves from seeking further clarity in order to appear impartial. But there is a tendency among South African judges to be more engaged during proceedings than their Nigerian counterparts. This could be attributed to South Africa's Roman-Dutch civil law heritage and the stronger constitutional imperative in South Africa for courts to apply customary law than in Nigeria.

A roundtable on the adversarial system which was organised by the Nigerian Institute of Advanced Legal Studies recommends against operating the adversarial system in Nigeria's courts.³⁹ According to one recommendation, judges should be allowed to 'descend into the arena' whenever there is a need to clarify issues in the particular cases. Secondly, that '[t]he concept of judicial precedent should be minimised because it stalls [judicial] imaginativeness, initiative and thought.' These recommendations are relevant as they indicate that judges should be free to apply their minds to credible evidence on a question of customary law where a judicial precedent would suggest a different outcome.

³⁴Choo *ibid*.

³⁵Even though the parties may ask supplementary questions. *Ibid*.

³⁶For England and Wales. McEwan J *Evidence and the Adversarial Process – The Modern Law* (1998) 85 & 87.

³⁷*Ibid* 57.

³⁸Rule 10 (1) Rules of Court, Constitutional Court South Africa. GN R1675 Gazette 25726 of 2003.

³⁹ Communiqué on the roundtable on the adversary system: a failed process?' convened by the Nigerian Institute of Advanced Legal Studies which held on Tuesday, 22nd March 2011 at the Professor Ayo Ajomo Auditorium of the Institute of Advanced Legal Studies at the University of Lagos, Lagos. See recommendations 4 and 5.

8.3.5 Systems of consultations

The systems of official and unofficial consultations adopted by the courts of lower jurisdiction, in so far as they entail the consultations of persons versed in the applicable customary law, would influence the exercise of the judges' discretion towards the ascertainment and application of living customary law. There are however concerns where chiefs and headmen consult magistrates who themselves require assessors to ascertain and apply customary law. Even though this is unofficially done, it reveals the risk of tampering with the adjudicatory structure of these courts with the same challenge faced by the Western styled courts, i.e. the encroachment of Western conceptions of law on the otherwise revered knowledge of the chiefs and headmen, which is an advantage it has over western trained judges. Part of the reason why these chiefs and headmen's courts consult magistrates is the underlying pressures they feel to comply with standards of the magistrates with respect to their judgements.⁴⁰ This is similar to the experience of the commissioner's courts in Nigeria who were overwhelmed by Eurocentric conceptions and away from the application of living customary law.⁴¹

One way the pressure to consult magistrates has impacted courts of chiefs and a headman is the use of judicial notice, which is not ordinarily applicable to them. This has led them away from the primary focus of attaining substantive justice towards compliance with 'pre-ordained rules'.⁴² The empirical data reveal that the pressures to conform to statutory pre-ordained rules have now set in and the implication unfortunately is that it will hinder its focus on applying living customary law.⁴³

The pressure to conform to the standards of a higher appellate court takes another form for judges of the customary courts in Nigeria but the results are similar. Their preference for precedents over the lived experiences of indigenes, elders and custodians of the applicable customary law calls for concern and is tended away from the ascertainment and application of

⁴⁰ See Bekker J C & Maithufi I P 'The dichotomy between "official customary law" and "non-official customary law"' (1992) JJS 50-51.

⁴¹ Okanny C *The Role of Customary Law in Nigeria* (1984) 8.

⁴² Bennett T W 'Re-introducing African customary law to the South African legal system' (2009) 57.1 AJCL 2-3.

⁴³ According to Dlamini, 'These courts themselves are not immune to the influence of western courts and ideas. Both their presiding officers, chiefs, and litigants that appear in these courts are influenced and emulate the approach of the western courts. See Dlamini C R B 'The Role of Chiefs In The Administration of Justice In Kwazulu' A thesis submitted in partial fulfilment of the degree of Doctor Legum in the Faculty of Law, University of Pretoria 1988 199.

living customary law. A recommendation is therefore made for the implementation of measures to stall these pressures that threaten the efficiency of these traditional institutions as primary custodians of living customary law. Judges of customary courts also need to be made mindful of their responsibility to ascertain and apply customary law.

8.3.6 Indices of the lower courts

The customary courts, in resolving contradictory evidence have relied on a number of considerations discussed in chapter seven. One of the considerations is the preference for judicial precedent over evidence of lived experiences. There is a challenge where these precedents are generally applied without credence to the lived realities and nuances of the particular community. The judges of the customary courts in the ascertainment and application of customary law have exercised their discretion by inventing the contents of customary law where no evidence is presented before the court. They have also misapplied precedents that have no bearing on the particular content before the court, and have applied rules of statutes based on Common law.⁴⁴ Order 13 r 1⁴⁵ provides that ‘the court may in its discretion make any order within its powers and jurisdiction which it considers the justice of the case demands whether or not the order has been asked for by the party who is entitled to the benefit thereof’. This thesis contends that the court cannot make such orders outside the proved applicable customary law.

Generally, the lower courts in both countries are reluctant to delve into the domain of the development of customary law and are careful to exercise discretion in ways that would develop customary law. This is especially so for the magistrate courts in South Africa who view the act of developing customary law as outside their power and the customary court judges in Nigeria who feel that it is the right of the communities to develop their customary law. However, in certain instances, in the customary courts, the judge exercises discretion to fill up

⁴⁴ Writing on ‘The nature of Judicial Process in Anglo-Nigerian Jurisprudence’ Adeyemi Ajani explained that in the absence of a ‘rule or standard’ for a judge to apply in a case, such a judge would create one which is satisfactory to the lawyers and what is generally acceptable to a high number of people that constitute the broader society. That ultimately, the judges’ premise would be the achievement of justice. Ajani op cit note 4 at 7 & 8.

⁴⁵ FCT Customary Court (Civil Procedure) Rules 2007.

gaps for the sake of achieving certainty and compliance to repugnancy standards and this may be a form of development and positivist inclined.

The suggestion by one of the customary court judges that the development of customary law should imbibe the broad principles of the customs of major communities could lead to the application of customary law that is foreign to that particular community. Since these lower courts are reluctant to attempt development, the tendency will at worst be a case of absolution or a declaration of unconstitutionality or failing to meet the repugnancy standard.⁴⁶

Development at the chief's court is done differently. Where they are aware of statutory provisions that conflict with the customary practices, at the point of making a decision in a case before them, they confer with the council and the community at large to develop the living customary law. Sometimes the chief may, where he considers it reasonable, on his own volition, develop the customary law to conform to statutory provisions.

Two practices at the chiefs' courts may affect the courts discretion towards living customary law. The first is the fact that the chiefs sometimes go to the magistrate courts to observe what is done there to be guided as to what to do in adjudication. As earlier mentioned, this may alter the system of adjudication to suit the Western styled courts systems. The second is the utilisation of their own records of proceedings as a guide to decision-making in similar cases. This will amount to producing official customary law even in the chiefs' court. The danger is that after a period of time, what the chiefs' and headmen's courts apply as customary law will have little bearing with living customary practices.

Both magistrates and judges of the customary courts indicated that legal representation of litigants aids them in adjudication and particularly in ascertaining and applying living customary law. According to them, being Western styled courts manned by trained lawyers, the

⁴⁶Ajani op cit note 4 at 3, 6 & 7. Adeyemi finds after reviewing cases during Nigeria's first and second republic that Nigerian judges tend between both judicial passivity which greatly constrains any exercise of discretion, and activism which fosters the exercise of discretion. This is not because there are no gaps or blurred laws but because they choose to non-suit in certain instances as in the case of *David Oye Olagbemiro v Oba Oladunni Ajagunbade III & Ogbomosho Local Government* (1990) LPELR-SC.178/1987. Here, the high court judge non-suited the case because the plaintiff's vendors had been shown to have some interest in the land in dispute although exclusive ownership was not proved by them' in accordance with the applicable customary law. The advantage here is that the rights of the parties is preserved until sufficient evidence is obtained in another suit thereby giving an opportunity for living customary law to be eventually proved.

legal practitioners understand the procedure and standard of proof and endeavour to ensure that sufficient evidence is put before the court.

Another challenge in the lower courts is where the court approaches the ascertainment of customary law using a legalistic approach to problem solving, as opposed to the customary law preference for a commonsensical approach.⁴⁷ Such a legalistic approach, which draws a clear distinction between 'procedure, evidence and substantive law', would be inappropriate, because customary law knows no such distinction since it is not divided along lines of specialisation as 'an European type court would in an abstract sense deal with a legal principle.'⁴⁸

Even a customary court constituted by trained lawyers which ostensibly acknowledges that no such distinction can be applied to customary law, may yet approach ascertainment oblivious to a mind-set that has been shaped by European legal traditions. The courts may still resort to the strict rules of evidence, and may also view, interpret and approach the application of customary rules very differently from a traditional chief. This is because there are distinctions on how the judge and the traditional chief view customary law. While a judge who is a trained lawyer views the rules of customary law as 'guidelines', a traditional chief views them as 'prescriptive'.⁴⁹ Thus, the result produced from ascertaining and applying customary law could be drastically different. Indeed, none traditional courts are more likely to produce an outcome that fails to affirm the actual practice relating to the custom.⁵⁰

The day to day adjudication on customary law issues gives the judge of a customary court and even the customary court of appeal an edge over that of a regular court who might become more overwhelmed by English law concepts which he/she unconsciously imports into the customary law cases before it.

⁴⁷ A good instance is the scenario related by von Benda-Beckman's testimonies of witnesses related to the litigant which he states are usually treated with suspicion and sometimes are rejected by judges on that basis whereas in customary law parlance, it 'is considered normal and desirable' to have relatives testify on behalf of litigants. See Beckman K B 'The use of folk law in west Sumatran state courts' in Allott & Woodman (eds) note 17 at 83-84. See also Allott A N, Epstein A L & Gluckman M op cit note 19 at 22.

⁴⁸ Bekker & Maithufi op cit note 40 at 49.

⁴⁹ Beckman op cit 47 at 86-87.

⁵⁰ Ibid.

Though the chiefs and headmen's courts have resources that are useful to the ascertainment and application of customary law, the earlier proposals in the Traditional Court's Bill giving enormous powers to traditional leaders did overstretch customary law practices.⁵¹ It attempted to centralise powers on the chiefs and fence out other vital roles played by traditional hierarchies in the communities and this may foster an environment that could create a form of customary law emanating from the chiefs without any consensus from the people.⁵²

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In sum, it is vital to note that this thesis acknowledges the limitations of associating living customary with only its rules. Rightly ascertaining customary law must go beyond the conventional methods of ascertainment as Himonga et al state that customary law:

[I]s found in sources such as language, rituals, history, folktales and storytelling as well as current issues that are prevalent in oral communications In the normal course of events, participants have access these sources and have no difficulty in interpreting them.⁵³

These sources cannot be adequately captured by official customary law and hence continue to make necessary evidence of lived experiences of the people whose customary law is sought to be ascertained. Bekker and van der Merwe endorse the recommendation of the South African Law Reform Commission for courts to appoint assessors from communities or experts in the field to aid the ascertainment of customary law which could dispense with the need and cost of calling witnesses by litigants.⁵⁴ This thesis asserts that given the volatile nature of customary law, even chiefs who are its custodians need to confer with their counsellors and elders. Therefore utilising assessors whose knowledge cannot be challenged under cross

⁵¹Land and Accountability Research Centre 'Traditional Courts Bill' <http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/> (accessed on 24/01/2017).

⁵²Ibid.

⁵³Himonga C, Nhlapo T, Maithufi I, Mnisi-Weeks S, Mofokeng L & Ndimba D. *African Customary Law in South Africa Post-Apartheid and Living Customary Law Perspectives* (2014) 50.

⁵⁴Bekker J & Van Der Merwe I 'Proof and ascertainment of the customary law.(2011) 26 SAPL 122-123.

examination has a higher tendency to give room for errors that conflict with living customary law.⁵⁵

Having discussed the salient issues that emerged from this research, the summary of the similarities and differences in the factors that impact on the court's ascertainment and application of customary law identified in both countries are stated below.

8.4 Summary of similarities and differences in the factors identified

The jurisdiction of superior and lower courts to hear customary law cases in Nigeria and South Africa are not the same.⁵⁶ Similarities and differences exist in the structure of their courts, rules, processes and practices, as well as in the factors that influence discretion. With regards to superior courts, judges basically utilise similar methods of ascertainment such as precedents, texts, codes or legislations, witnesses and experts. However, South African courts tend to place greater reliance on the expert evidence of historians, anthropologists, sociologist and archaeological reports. Other similar factors include considerations in the resolution of evidential contradictions in terms of the weight apportioned to the evidence before the court, constraints of appellate courts, legislative protection of the status of statutory law over customary law, constitutional and statutory compliance, interface between the rules of positivism and pluralism and consideration for legal certainty.

The distinctions in the factors identified and peculiar to South Africa cover areas of choice of court process in instituting an action where the commencement of an action by way of motion may restrict the judges from accessing sufficient evidence for clarification of grey areas or gaps in the affidavit evidence. There is also the particular distinctiveness of the judges' ideology and experience and how these impact on how they ascertain and apply customary law. Others include the transformation agenda and Constitutional mandate to develop customary law and the impact of the participation of non-governmental organizations and government commissions on the courts' decisions.

⁵⁵ Bennett and Park had expressed the opinion that assessors' should be subjected to cross examination by parties in a case. See Bennett T W *Application of Customary law in Southern Africa* (1985) 28. See also Park AEW *The Sources of Nigerian Law* (1993) 89-90.

⁵⁶ In terms of jurisdictions, areas of specialisation of the judges and court types.

For Nigeria, these distinctions cover the hindrance of technicalities where the ground of appeal may not be directly linked to ascertainment of customary law, but would impact it nonetheless, accuracy of interpreters, the inability to afford legal representation and incompetence of counsel. All these factors were categorised under institutional, substantive, socio-economic and political, and procedural factors respectively.

The Summary of factors that influence the ascertainment and application of customary law are highlighted below.

8.5 Summary of factors that influence the ascertainment and application of customary law

8.5.1 Institutional factors

Institutional factors that influence how judges exercise discretion when ascertaining and applying customary law pertain to the judges' exposure to customary law during training, the judge's background, and law career. They also include statutory prescripts and the limitations of the adversarial system.

When statutory provisions prescribe what courts may ascertain, they invariably regulate the exercise of discretion. Under the Nigeria Evidence Act for example, the requirement that 'long usage' may be used as evidence of the existence of a custom invariably constrains the ascertainment of living customary law. Also, the absence of notoriety as a requirement for judicial notice does not mandate reference to sufficient judgements to credibly validate the establishment of a customary norm which may also constrain the ascertainment and application of living customary law. On the other hand, the statutory definition of customary law in South Africa can clearly accommodate the features of living customary law.

Giving primacy to statutory law over the living norms where they differ – as it frequently happens, also impedes the ascertainment and application of living customary law. Likewise when statutory rules are misapplied in relation to customary procedures. An example is where rules pertaining to hearsay evidence are applied on historical narrations which under customary law are valid normative sources rather than hearsay evidence. However, where a statute

provides for the application of a customary norm without prescribing its content, it gives room for the exercise of judicial discretion in the ascertainment and application of living customary law.

Inadequacy of the law curricula on customary law in both countries constitutes another persistent institutional constraint, which has prompted⁵⁷ many jurists to express the need for change in the curricula. In South Africa, the need is hinged on the transformation objectives that underpin the Constitution.⁵⁸ According to Dennis David, change is necessary to avoid a conflict between the 'legal culture conveyed through existing legal education' and the constitutional ambition.⁵⁹ Indeed, some steps have been initiated in that direction, with the Council of Higher Education 'responsible for quality assurance of higher education qualifications'⁶⁰ in South Africa having mandated a review of the LL.B curriculum to incorporate, amongst others, cultural rights that are rooted in the Constitution and its transformative mandate.⁶¹ Nigeria should tow the same line. There is good reason for this. Law curricula in the country already offer LL.B degrees on sharia and common law. A curriculum that offers specialized LLB degrees on customary law and common law should also be established. Though partly applicable in Nigeria, for both jurisdictions, training in customary law should be a

⁵⁷ Charles Fombad advocates for the reform of the content of legal education in the curricula of African universities for the inclusion of African legal systems for three reasons. First is to enhance the necessary drift from over reliance on 'Euro-American bias'. Secondly, to acknowledge the evolving nature of law in Africa, and thirdly, 'to reflect the practical socio-economic, cultural and political realities of an Africa making great strides towards knowing more about itself ...' This is just one out of many calls that have been made over decades. Fombad C M 'Africanisation of legal education programmes: The need for comparative legal studies' in Mancuso & Fombad (ed) *Comparative Law in Africa Methodologies & Concepts* (2015). Nkoane M 'The Africanisation of the universities in Africa' available at <http://alternation.ukzn.ac.za/Files/docs/13.1/04%20Nko.pdf> (accessed on 17/01/2017). See also Mngomezulu B R 'What does the Africanisation of a University Entail? Lessons from East Africa' (2013) 3, 1 & 2 *AJPES* 97-113. See Louw M 'Africanisation: A rich environment for active learning on a global platform' (2010) 32 *Progressio*.

⁵⁸ David D 'Legal transformation and legal education: Congruence or conflict: part II: reflections on Justice Langa's court and philosophy' (2015) 1 *AJ* 173-174. See also Quinot G 'Transformative Legal Education' Inaugural lecture delivered on 19 September 2011 Department of Public Law Faculty of Law Stellenbosch University 6.

⁵⁹ David Ibid 174.

⁶⁰ Based on the National Qualifications Framework (NQF) Act, 67 of 2008.

⁶¹ Council of Higher Education, Higher Education Qualifications Sub-Framework Qualification Standard for Bachelor of Laws (LLB) 2015 available at http://www.che.ac.za/sites/default/files/Draft%20Standards%20for%20LLB%20v8final_Ready%20for%20Public%20Comment_20150807.pdf (accessed on 04/02/2017) p8. See also Penelope Andrews 'Law faculties must embrace difference to produce great graduates' available at <https://theconversation.com/law-faculties-must-embrace-difference-to-produce-great-graduates-59927> (accessed on 04/02/2017).

prerequisite for at least some judicial appointments into courts that exercise jurisdiction in customary law.⁶²

8.5.2 Substantive factors

Substantive factors identified include the judges' grasps of the concept of customary law and its development, methods of ascertainment, constitutional standards, the quest to achieve justice, the repugnancy and public policy tests, the judges' perception of judicial discretion, and considerations of legal certainty. These play significant roles on how the judges exercise discretion.

Other considerations such as equity, humaneness, conscience, justice and even constitutional compliance have influenced the exercise of discretion by judges in both the courts of superior and lower jurisdiction. According to Aldrich and Cass, '[e]ach judge brings different values and life experiences to law and facts, often coming to a different conclusion than another judge might in a similar situation.'⁶³Sometimes, pragmatism is tied to it. Posner asserts, with respect to American courts, that pragmatism has featured considerably as a factor that determines how judges adjudicate.⁶⁴The findings in this thesis also confirm that pragmatism sometimes influence how judges exercise discretion in ascertaining and applying

⁶²Impressively, in 2015, the Judges' Matters held a forum focused on how the Judicial Service Commission may ask questions relating to customary law to the candidates who applied for appointment to the Constitutional Court to see how equipped they are to adjudicate on customary law matters. 'Judges Matter is a loose coalition of civil society organisations working' also on the appointment of judges.

⁶³ Aldrich S & I Cass M 'Judicial discretion: Melding facts and pristine law' (2013) BBM available at <http://mnbenchbar.com/2013/11/judicial-discretion/> (accessed on 11/01/2017). See also Judge Moseneka's presentation at the 'Conference to Celebrate Indigenous Customary Law at the University of Cape Town and the Research of Professors Chuma Himonga and Tom Bennett' which held on 13 March, 2017 at the Moot Court, Faculty of Law, University of Cape Town at 1.00pm. Judge Moseneka stated that judges at the Constitutional Court have put up a set of values that determine how they adjudicate such as the cause for equality. Since 1985, Woodman had mentioned that 'personal knowledge of the judges, judges' opinions of what is reasonable; and assertions by litigants when not effectively challenged' continued to be utilised by judges. The data utilised in this thesis reveal that these factors still subsist. See Woodman G R 'Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria' in Allott & Woodman (eds) note 17 at 147.

⁶⁴Postner R A *How Judges Think* (2008) 230.

customary law in Nigeria and South Africa. Depending on the circumstances, it may impede or enhance the ascertainment and application of living customary law.⁶⁵

Judges subject the ascertainment and application of customary law to Constitutional standards in two ways. First, some judges (a few) would at the point of ascertainment accept evidence of the content of customary law that is more consistent with Constitutional provisions. Secondly, almost all judges first ascertain the customary norm and thereafter subject what has been ascertained to a Constitutional standard applying same to the facts of the case. In the first category, the judge's discretion could deviate from ascertaining living customary law if at the point of ascertainment it rejects a customary norm after finding that it fails a Constitutional standard. This may result in imposing a fictitious version on the parties.

With respect to subjecting what has been ascertained to constitutional standards, the challenge arises over whether what has been ascertained complies with Constitutional provisions such as the bill of rights. Where it fails, it may be developed. In this regard, Lehnert is of the view that the court may invoke the choice of law rule and apply another norm or statutory provision and that only the legislature can develop customary law through legislation.⁶⁶ In other words, courts may only make pronouncements on constitutionality.⁶⁷ Should courts adopt such a view, it would severely impede the development of customary law where necessary.

The values of customary law which may conflict with Eurocentric conception of rights should not be ignored in considering what the justice in a case should be.⁶⁸ Cobbah explained that Western philosophy of law is not 'the only rational way of living human life'.⁶⁹ His position is that efforts 'should be directed to searching out homeomorphic equivalents in different

⁶⁵Woodman explained that certain factors make it inevitable for judges to exercise discretion for practices that are different from the normative practices of the people even if they are aware of what these normative practices are. This is where the norms are still in the process of evolvement but the judges apply them as though they have evolved on the basis of considerations for the social realities on ground. Woodman 'Judicial development of customary law: The case of marriage law in Ghana and Nigeria' (1977) 14 UGLJ 120.

⁶⁶Lehnert W "The role of the courts in the conflict between African customary law and human rights' (2005) 21 SAJHR 249.

⁶⁷Ibid at 249.

⁶⁸For instance is the customary law value of communal rights over individualistic rights.

⁶⁹Cobbah J A M 'African values and the human rights debate: An African perspective' (1987) 9 HRQ 328-9. (1987).

cultures'. Lehnert, writing on the South African situation,⁷⁰ asserts that customary law values are not necessarily inimical to constitutional values and should also be considered in the determination of the constitutionality of the customary rule in question.⁷¹ At least the right to culture in sections 30 and 31 assures this. Lehnert advocates for the development of customary law which entails 'the application and interpretation of the law in light of the Constitution' rather than merely 'striking down a rule' that violates the Constitution.⁷² His advocating interpreting customary law 'to accommodate human rights ... by taking into account the different societal mechanism'⁷³ is apt. However, his position that the choice of law rule be invoked, and that statute be adopted by the courts where the applicable customary rule offends constitutional provisions would impede the application of living customary law.

Section 39(2) of the South African Constitution specifically confers this responsibility on the court. There are two factors that determine why courts develop customary law. The first is to bring it into conformity with the Constitution and its underlying values. The second is to ensure its relevance to the lived realities of the people who are bound by it. Similar considerations underpin subjecting customary law to a repugnancy, public policy and statutory compliance review. However, every review must be moderated by one overarching principle, namely the preservation and development of customary law rules or values that are not necessarily harmful. This thesis recommends the practice at the chiefs and headmen courts in the North West, South Africa where the community and the elders would be consulted on what they would want the development to entail. Vulnerable members of the community should not be excluded in the consultations.⁷⁴ This may be a cumbersome task for an adjudicatory institution to embark upon but a pragmatic way to address this should be considered. Where judges for the sake of achieving legal certainty take a position or manufacture customary rules, they exercise wide discretion outside the confines of evidential rules.

⁷⁰ The same also applies to the Nigerian situation.

⁷¹ Lehnert op cit note 65 at 245. Bennett asserts that customary law values are not necessarily harmful. See Bennett T W *African Customary Law* (1991) 20-35. See also Bennett T W *Human Rights and African Customary Law* (1995) 4.

⁷² Ibid 249-250.

⁷³ Ibid 250.

⁷⁴ Tobin, B *Indigenous Peoples, Customary Law and Human Rights – Why Living Law matters* (2014) 182. See also Mmusinyane B 'The role of traditional authorities in developing customary laws in accordance with the constitution: *Shilubana and Ors v Nwamitwa*' (2009) 12.3 PER 4.3.3 second paragraph.

A factor that features in all court types in both jurisdictions apart from the chiefs and headmen's court is the consideration for certainty. While some judges admit that it influences how they ascertain and apply customary law, a few indicated otherwise. While for the latter, it leads to an absolution, the application of the former may lead away from living customary law, therefore, the format taken by the judge in *Lewis v Bankole* discussed below is suggested. What is crucial here though, is the fact that the way and manner the chiefs and headmen's court handle this promotes the ascertainment and application of living customary law.

One of the chiefs' interviewed on the consideration of certainty, would ensure the participation of the entire community to agree on a rule within the bounds of what is acceptable to the community. Another chief would be guided by the people's practices or what rule the community agrees should guide them. These methods would lead towards living customary law. However for another chief, where the content of customary law is not so clear, he would import provisions from applicable statutes and the Constitution for the sake of achieving certainty or covering up gaps, and this exercise of discretion would most likely lead away from the ascertainment and application of customary law.

Ubink alludes to the fact that endeavours by governments and researchers to reduce customary law into writing is to avoid 'uncertainty and discretion caused by its flexibility and to come to grips with the content and nature of customary law for their own understanding'.⁷⁵ While this is true for the attempts made and being made in both countries, the achievement of certainty is not a value in customary law and seeking certainty should never defeat the ascertainment and application of living customary law, or result in its crystallization.⁷⁶

Lastly, subjecting customary law to legislation, the constitution and its bill of rights should never fail to acknowledge the concept of rights under customary law. Fortunately, South Africa's Constitution guarantees the right to culture.⁷⁷ According to Mnisi, the debates on

⁷⁵Ubink J 'Stating the customary: An innovative approach to the locally legitimate recording of customary law in Namibia' (2011) TJWPS 1.

⁷⁶Himonga C 'African customary law in South Africa – The many faces of *Bhe v Magistrate Khayelitsha*' (2005) RA 178. See also Bennett T W *Human Rights and African Customary Law under the South African Constitution* (1997) 63.

⁷⁷Mnisi S *Interface between Living Customary Law of Succession and South African State Law* being a thesis submitted for the award of the degree DPhil at New College Oxford 2009 p172. Though cultural rights are not

constitutional and customary law rights can be analysed in two ways. First, are Eurocentric or universalist views about human rights, for which the concept of the universality of human rights is essentially focused on the individual. These views are antithetical to the cultural relativism that is imbedded in customary law concepts about rights, which promote communality as opposed to individuality, and conciliatory justice.⁷⁸ Secondly, the prioritization of 'civil and political rights' by universalists contrasts with the prioritization of 'socio-economic and cultural rights' by relativists.⁷⁹ To impose Eurocentric universalist views of rights on customary law simply overlooks the harmonious communality that underpins African societies and the rules that regulate and secure their interests. Thus, ensuring that customary law complies with Constitutional rights should never fail to make proper consideration for the value systems that underpin customary law.

8.5.3 Socio-economic and political

The transformative mandate of the South African Constitution represents a significant socio-political and economic factor that informs the ideological dispositions of and experiences of South African judges. Socio-economic factors also impact the participation of non-governmental organizations and government commissions, the ability to fund the costs of litigation, and the quality of legal representation. The transformation agenda implemented in Nigeria had a different focus and so it did not impact on how courts ascertain and apply customary law in the way and manner that it occurred in South Africa.⁸⁰

specifically protected in the Nigerian Constitution, the affirmation of the African Charter on Rights by the Nigerian legislature adopts this right.

⁷⁸Mnisi op cit note 77 at 158. Examples of universalist are Ronald Dworkin and Stanley Fish. See Patterson D 'The poverty of interpretative universalism: Towards the reconstruction of legal theory' (1993) 72.1 TLR.

⁷⁹See Mnisi note 77 at 158-162 for a more detailed discourse.

⁸⁰Transformation agenda 2011-2015 Summary of Federal Government's Key Priority Policies, Programmes and Projects Available at <http://www.nationalplanning.gov.ng/images/docs/Transformation.pdf>.

10. The transformation agenda of the previous government was mainly focused on economic development. See Gyong J E 'A social analysis of the transformation agenda of President Goodluck Ebele Jonathan' (2012) 8.16 *ESLJ*. That of the current government claims 'anti-corruption' as its main focus. See 'The NCC is contributing immensely to President Buhari's transformation agenda' July 12, 2016 Techpoint available at <https://techpoint.ng/2016/07/12/ncc-buhari-transformation-agenda/> (accessed on 30/06/2017). Though it sought to improve the '... capacity and efficiency in judicial service delivery, [and] ... professionalism in legal practice for better service delivery' generally, its effect was not visible on how courts ascertain and apply customary law.

In South Africa, the transformation mandate of the Constitution to ensure that customary law is developed in the 'spirit and purport' of the bill of rights has been particularly prominent in the minds of judges of the Constitutional Court when they ascertain and apply customary law. Hence, in the *Shilubana case*⁸¹ the court exercised wide discretion to justify departure from customary norms that excluded women from the line of succession. The court's primary rationale was to uphold equality for women even in succession cases. The approach however is questioned.⁸² Mnisi described it as a 'contrivance' and states that it resonates with the central ideology of the positivist legal traditions in which the judges were trained. Bekker and Van der Merwe observed that the court's decision was not a development of customary law. Rather, it was a preference for an amendment to the customary rule on succession, made by the Valoyi Royal family to aid succession by Ms Shilubana.⁸³ Though the preference was informed by the need to achieve the Constitution's standard of gender parity on questions of succession, whether the court could initiate such a radical departure that alters the essence of the customary rule is debatable. Since Ms Shilubana was no longer in the line of succession and if a reversion was proposed, there were earlier cases of women who were skipped before her and should have been reverted to.

In Jeffrey Brand-Ballard's rightly held view, 'a court misapplies a legal standard when it incorrectly presents the standard as a reason to reach a result or incorrectly treats the standard as a reason to reach the result.'⁸⁴ A judge's discretion must be exercised within 'valid legal standards'.⁸⁵ The Constitutional Court's acceptance of an amendment to customary rule without first ascertaining/weighing the prevalence of the amendment rule by the entire community over partisan interest therefore arguably overreached the limits of what was legally permissible under customary law.

According to most constitutional law scholars, adjudicating constitutional provisions sometimes necessitates the exercise of judicial discretion. Generally, however, there is dissent

⁸¹Supra. Discussed in chapter five.

⁸² According to Mnisi, positivism expects that 'laws must satisfy the principle of legality and, hence, be clear and specific, consistently applicable, foreseeable, and (easily) ascertainable'. See Mnisi note 77 at 181.

⁸³Bekker and Merwe op cit note 54 at 127.

⁸⁴Brand-Ballard J *Limits of Legality the Ethics of Lawless Judging* (2010) 48.

⁸⁵Ibid at 46.

about the legitimacy of discretion.⁸⁶ For Pettys,⁸⁷ judges in constitutional adjudication may acceptably exercise discretion where there is a divergence of judicial opinions regarding the facts to which a constitutional rule applies.⁸⁸ This however does not provide justification for the minority judgement in the *Pilane*⁸⁹ case since the appellants have clear cut constitutional rights which the perception of the facts by the dissenting judges infringe upon even if they were true. Judicial power (which includes its exercise of discretion) is accepted on the terms of its adherence to its process as a basis for its legitimization.⁹⁰ This legitimacy is also tied to transparent engagement with the judging process⁹¹ to which procedural factors are vital and impact on it.

8.5.4 Procedural factors

One of the most critical procedural processes has to do with resolving conflicting evidence. Courts exercise considerable discretion when resolving conflicting evidence, and usually on a balance of probabilities, (a standard of proof under the rules of evidence). They may rely on the testimonies of witnesses who are custodians of customs, or may resort to a combination of anthropological or historical or other relevant texts, evidence and precedence. There were also instances of wrong application of these evidential rules by judges. These all influence how the court exercises discretion in the ascertainment and application of customary law. However, undue reliance on procedural rules does sometimes impede the exercise of discretion in ascertaining and applying living customary law. An example is where the court employs a technical rule that has nothing to do with the content of the applicable customary rule.

⁸⁶Pettys T E 'Judicial discretion in constitutional cases' (2010) 10.36 UILSRP available at file:///C:/Users/Rebecca/Downloads/SSRN-id1717 074.pdf (accessed on 11/12/2017) 3.

⁸⁷Ibid. This is the notion that 'judges faced with constitutional disputes either behave in a democratically legitimate manner by dutifully obeying the sovereign people's constitutional instructions or behave in a democratically illegitimate manner by usurping the role of the sovereign people and imposing their own personal preferences on the rest of the nation' p3.

⁸⁸Ibid at 4-5.

⁸⁹Supra. Discussed in chapter five.

⁹⁰Writing on the bureaucratization of the American judiciary. Fiss O M 'The Bureaucratization of the Judiciary' (1983) FSS 1443.

⁹¹Lasser M *Judicial deliberations A Comparative Analysis of Judicial Transparency and Legitimacy* (2004) 3-4.

When an appellate court presides over a customary law dispute, it is confronted by two limitations that could influence how it exercises discretion to confirm or overrule a lower court's finding on a question of ascertainment and application. First, unlike trial courts, appellate courts do not have the opportunity of testing the veracity of a testimony by observing the witness' demeanour. Secondly, the rules of procedure constrain appellate courts from tampering with the findings of the trial court except for the achievement of justice. Exercising discretion within these limitations may mean that appellate courts may not always have the opportunity of ascertaining living customary law.

Another procedural factor has to do with the choice of court process for commencing a lawsuit. Where the party comes by way of a motion that excludes pleadings and testimonies, what is put before the court as evidence of the applicable customary norm would be limited. In such instances, the court might be led to exercise discretion in a way that falls short of ascertaining living customary law, simply because there is insufficient evidence before the court.

Flawed interpretations by court interpreters may also exclude testimonies that are crucial to ascertaining the relevant norm. The role of registrars in identifying and confirming amici, and the status of witnesses invited as either principal members of their communities or chiefs as expert witnesses enables the court to be possessed of evidence suitable for the exercise of its duty as it exercises its discretion. A salient point is the provision of order 20 rule 1 of the Court of Appeal Rules that records of proceedings from the customary court of appeal should also be submitted in the language in which the case was heard as well as in English language; this may aid ascertainment. This is because the vernacular content of customary norms given in evidence will be available for assessment.

The collegial sitting at the Constitutional Court where judges contribute actively to debates drawing on their wealth of experience, research and direct involvement with people also impacts on the exercise of discretion. So far, there were only a few indications that the gender of the judge impacts on how judges exercise discretion. Research findings show that the crucial factor is the judge's ideology and experience which in a few instances is buttressed by the judge's gender.

Having summarized the key findings of the factors that influence the ascertainment and application of customary law by formal courts in Nigeria and South Africa, the thesis presents below a model process of ascertainment and application of customary law by the court.

8.6 A model process of ascertainment and application of customary law by the court

The case of *Lewis v Bankole* attached here as 'Appendix F'⁹² is a *locus classicus* in Africa on the fact that it is living customary law that courts ought to ascertain. It also has a lot to offer on how courts should ascertain and apply customary law. Here, the court was faced with the question of whether according to the applicable native law and custom in Lagos, the estate of older children who had been assigned properties by their deceased father prior to his death could, several years after his death, claim rights to another property left by the deceased to the other children who had continued to live there and exercised ownership after the father's demise. The Supreme Court on appeal ordered that further evidence be obtained on the content of the applicable customary law upon which the Full Court could give its judgment or revert the matter back to the Supreme Court for final decision. At the Full Court, five Lagos chiefs were invited by the judge to give evidence on the contents of the applicable customary law as to how they would decide the issues if the case had been before them.⁹³ They were put on oath and the court presented a scenario with facts similar to the issues before the court and questions were posed to the chiefs at the same time. They were allowed to withdraw and confer amongst themselves before they responded one after the other to each of the questions asked by the court on how he would decide the matter. Their respective answers to a large extent were similar but differed in few instances.⁹⁴ The court accepted the evidence and

⁹²Supra. Available at <http://www.nigeria-law.org/LawReporting/1909/D.W.%20Lewis%20%20Ors%20v%20%20Bankole%20%20Ors.pdf> (accessed on 03/08/2017).

⁹³ This is crucial because sometimes, the issue is not with respect to gaps in customary but that there might be gaps in the knowledge of and how the adjudicator understands what is presented as evidence of its content.

⁹⁴This case is attached as Appendix E to this thesis for details.

reasoning of the current chiefs in Lagos with their modifications which were based on current socio-economic considerations and rejected the old customary practice from outside Lagos.

It is vital to note that the court did not ask the chiefs for the content of customary law but created a scenario depicting the facts of the case and asked how they would resolve specific issues in the context and circumstances of the case. Hence, they did not give ideal rules or mere customary rules but approached the issues contextually and with the flexibility it deserved. The court's decision was based on the broad principles established from the responses of the chiefs collectively. The court still exercised a great deal of discretion in the nitty gritty of the facts with respect to the rights of the parties to the properties to achieve justice and fairness. Osbourn C J in his judgment delivered in the case in 1909 stated that:

[o]ne of the most striking features of West African native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics. The great danger in applying it in this Court is that of crystallising it in such a way that it cannot be departed from in cases where expediency demands, and where natives themselves would depart from it; and I therefore preface my findings with the remark that they are intended as findings of the general principles which govern native custom in Lagos at the present day, and not as hard and fast findings of immutable native law.⁹⁵

With respect to judicial notice, therefore, it is recommended that, based on the quotation above, judges should depart from contents of customary law to be judicially noticed on grounds of expediency and where it is established that natives themselves would depart from it. With respect to proof as facts, contextual applications would accommodate nuances, evolvments and flexibility rather than strict adherence to mere rules. These will gear towards the ascertainment and application of living customary law, however, subject to the intrinsic and extrinsic factors identified in this thesis that impact on the ascertainment and application process.

8.7 Concluding remarks

The courts have made gradual progression on how they ascertain and apply customary law over the years but a lot is still desired. The similarities and distinctions noted in both jurisdictions

⁹⁵P 10.

studied are not dissociated from the ideology, legal culture, history and other influences⁹⁶ which this range of factors explains. The identification of these factors should provide a platform upon which a process that enhances the ascertainment and application of living customary law will be nurtured.

The crux in the exercise of discretion under the institutional, substantive, procedural and socio-economic and political factors is that it must lead to the ascertainment of living customary law. Where it fails to do so, it defeats the purpose of the Constitutional provision that recognises customary law (which has been interpreted to mean living customary law) as an independent source of law at par with other sources of law in South Africa. This interpretation is also acknowledged by a replete of judicial authorities in Nigeria as what ought to be ascertained and applied in court.

Some of the cases analysed reveal that some judges did apply discretion outside the rules of evidence and principles applicable in the context of the cases. Richard Spindle explains that:

[A] trial court must (1) apply the general rules of law, both of substance and of procedure, to (2) his observation of the parties in question and (3) his determination of the issues joined and (4) his general knowledge of local conditions, plus (5) a searching inquiry into the honesty of statements made of positions taken, and (6) without unconscionable advantage to either party to the controversy b(7) bring about a determination of the issue joined, on the true merits of the controversy.⁹⁷

Any other external consideration or influence would amount to an abuse of discretion.⁹⁸ This thesis asserts that while the list above should be the determining factors, there are other factors outside these that impact on the judge's discretion in ascertaining and applying customary. These factors should be addressed in the quest for solutions to enhance the judges' exercise of discretion in the ascertainment and application of customary law.

While the legal framework provides a basis for the process of ascertainment and application, the loopholes noted should be addressed. The thesis reveals threats to an otherwise viable, unsullied system of adjudication at the chiefs and headmen's courts which

⁹⁶John C. Reitz 'How to Do Comparative Law' *The American Journal of Comparative Law*, (1998) 45.4 AJCL 626-7.

⁹⁷Spindle op cit note 13 at 154.

⁹⁸Ibid at 155.

must be addressed. The thesis also reveals that the path to a more viable process extends beyond the adroitness and expertise of the judge to include other areas incidental to the process that must be addressed, ranging from the content of legal education, ongoing knowledge and skills acquisition, the operations of the courts and the engagement of requisite staff, requirements for the recruitments of judges bestowed with this responsibility and economic interventions. These must be addressed including measures that enhance the integrity of the process. The solutions cannot ignore the socio-economic and political environment which one way or the other contribute to this process. To adequately address these would entail policies and deliberate interventions that would respect the distinctiveness of the customary law systems even in a positivistic dominated system of law.

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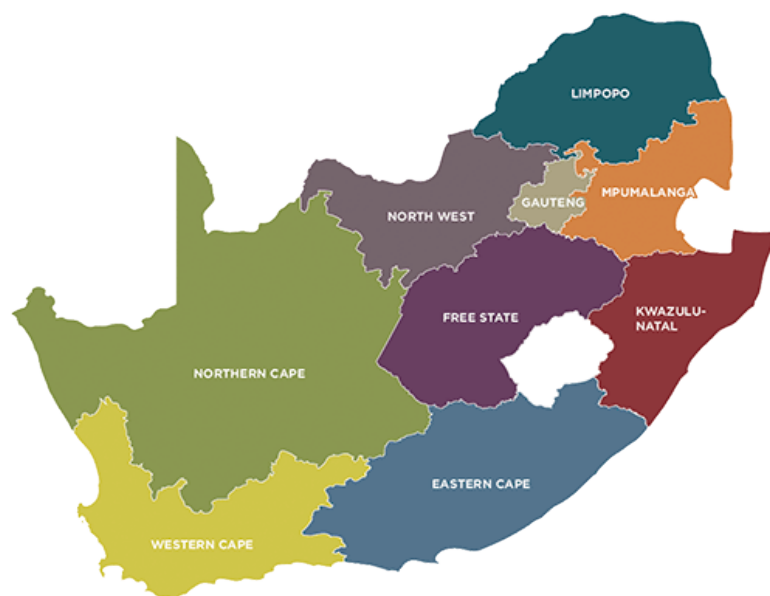
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APPENDIX A



Map of Nigeria showing Abuja FCT¹⁰⁰



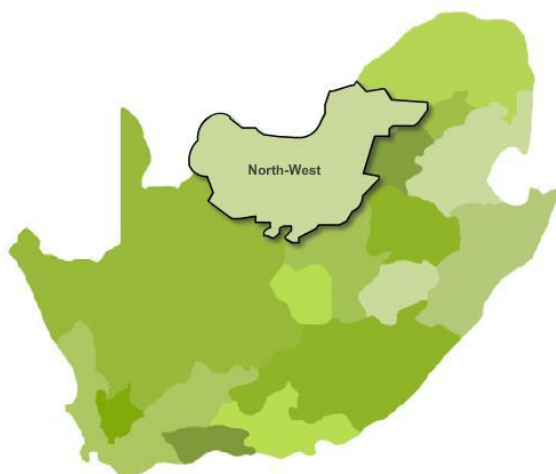
Map of South Africa showing the different provinces including Gauteng, Free State and North West Province where the courts researched are situated.¹⁰¹

¹⁰⁰ Available at <http://www.nigerianstat.gov.ng/> (accessed on 10/03/2017).

APPENDIX B



*Federal Capital Territory Abuja, Nigeria showing the three local government councils where the customary courts researched are located.*¹⁰²



*North West Province, South Africa showing where the magistrate courts and chiefs' courts researched are located.*¹⁰³

¹⁰¹ Available at

https://www.google.co.za/search?q=map+of+north+west+province+south+africa&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj7aAq8zSAhVdF8AKHVWZC9wQ_AUICCGB&biw=1280&bih=918 (accessed on 10/03/2017).

¹⁰² Available at

https://www.google.co.za/search?q=map+of+abuja+Nigeria&source=lnms&tbm=isch&sa=X&ved=0ahUKEwiR18nTqszSAhVFJ8AKHfTIBgAQ_AUICCGB&biw=1280&bih=918#imgsrc=LjnnHtcRj62QmM: (accessed on 10/03/2017).

APPENDIX C

Interview questions for judges

1. Can you tell me a little about yourself, your qualifications, and experiences in customary law outside legal practice?
2. Can you describe your experience of customary law in your practice as a legal practitioner?
3. How has your experience been in your adjudication of customary law cases as a judge?
4. Can you describe your experience with respect to the ascertainment of customary law as a judge?
5. Based on your experiences, what would you say are the challenges you have encountered with respect to ascertaining customary law in court?
6. What is your opinion of the need to consider 'certainty' as a value in the customary law applied by a judge to the dispute before him?
7. Can you please explain how you exercise judicial discretion in ascertaining the customary law you applied to disputes before you?
8. Can you tell me what recommendations you have for a strengthened and standardised process of ascertainment of customary law in Nigeria/South Africa?
9. What should I have asked you that I didn't think to ask?

¹⁰³ Available at <http://www.potatoes.co.za/regional-services/regional-map/north-west.aspx>: (accessed on 10/03/2017).

APPENDIX D

Interview questions for registrars

1. Can you tell me a little about yourself, your qualifications, and experiences in customary law outside legal practice?
2. What has been your experience with respect to the adjudication of customary law by courts, as a court registrar?
3. Can you explain the challenges you think the court has with respect to ascertaining customary law?
4. How are assessors appointed?
5. Can you describe the problems you face with regards to catering for participants like assessors and expert witnesses for the ascertainment of customary law in the court?
6. What suggestions do you have on how the ascertainment of customary law in court can be improved?
7. What should I have asked you that I didn't think to ask?

APPENDIX E

List of Cases for which Records of Proceedings were Analysed

South Africa

Constitutional Court cases

Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18

Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others (CCT 67/14) [2014] ZACC 36

Bhe & Others v Khayelitsha Magistrate & others [2004] ZACC 17para 154.

Gumede (born Shange) v President of the Republic of South Africa & Others (CCT 50/08) [2008] ZACC 23.

Mayelane v Ngwenyama and Anor (CCT 57/12) [2013] ZACC 14 (30 May 2013).

Pilane v Pilane (CCT 46/12) [2013] ZACC 3.

Shilubana and Ors v Nwamitwa (CCT 03/07/2008) ZACC

Supreme Court of Appeal cases

Alexkor Ltd and Another v Richtersveld Community and Others 2003 (6) SA 104 (**SCA**)

Amantungwa & Ors v Mabuyakhulu SCA Case no 513/09.

Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others (260/13) [2014] ZASCA 30

Mayelane v Ngwenyama and Anor SCA NBO: A541/11.

Mthembu v Letsela SCA 2000 (3) SA 867 (**SCA**).

Pilane v Pilane[2012] 4 All SA 626 (**SCA**)

Shilubana and Ors v Nwamitwa [2007] (2) SA 432. (**SCA**)

Southon v Moropane (755/2012) [2014] ZASCA 76.

North West High Court cases

Bakgatla Ba Sesfikile Community v Bakgatla Ba Kafela Tribal Authority Unreported North West High Court Case no. 320/11 (2011).

Maloko & Anor v Mosimane & Anor NWHC Case No. 1843/11

Pilane & Anor v Pilane & Anor. North West High Court (263/2010) [2011] ZANWHC 80

Segwagwa Mamogale v Premier North West Province & Ors Case no 227/2005.

Segwagwa Mamogale v Premier North West Province Case no 1156/2007.

Others

Alexkor Ltd and Another v Richtersveld Community and Others Case No 488/2001.

Amantungwa & Ors v Mabuyakhulu. NPD Case No. 4023/08

Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others GNP [2012] 4 All SA 544 (GNP)

Bhe & Others v Khayelitsha Magistrate & others WC Case No. 9489/02

Gumede (born Shange) v President of the Republic of South Africa & Others Case No. 4225/2006.

Mayelane v Ngwenyama and Anor GNP Case No. 29241/09.

Mthembu v Letsela Case No 488/2001

Shilubana and Ors v Nwamitwa TPD Case No. 25411/2002.

Southon v Moropane (14295/10) [2012] ZAGPJHC 146.

Magistrate court cases

Botlholo Motswamasimo v Moholo Gadifele Magistrate Court Lehurutshe Unreported Case No 03/2011

Charles Obakeng Morule v Kenole Aleta Matlhaku Magistrate Court Lehurutshe (Could not sight the case number but judgment was delivered on 15/12/2005).

Ditile Pitso v Mogami Modiri Dinokana Magistrate Court Lehurutshe (Could not sight the case number but judgment was delivered on 19/01/2005).

Kharu Matlhoko v Bothonoka Pheto Magistrate Court Lehurutshe Unreported Case No. 04/11

Lesego Diutlwileng v Tshotlego Lebelwane Magistrate Court Lehurutshe Unreported Case No 08/2003

Maribana Mokgaotsi v Shimane Maduenyane & Kenaope Maduenyane Magistrate Court Lehurutshe (Could not sight the case number but judgment was delivered on 11/04/2006).

Maphuye Onkemetse Sophy v Balebetse Maphunye Bahurutshe Magistrate Court Lehurutshe t Unreported Case No. 06/2013

Molokwane Modise v Molokwane Semakaleng Sophie Magistrate Court Lehurutshe Unreported Appeal No. 1/2011

Mongae Tiro v Sebogodi Israel Magistrate Court Lehurutshe (Could not sight the case number but judgment was delivered on 12/12/03).

Patricia Nazo v Mogami Moeng Mmabatho Magistrate Court Unreported Appeal No 2971/13.

Tlogelang Mosagale v Nkaki Mooketsi Magistrate Court Lehurutshe Unreported Case No. 18/03.

Courts of Chiefs & Headsmen Cases

Botlholo Motswamasimo v Moholo Gadifele Chief's Court Dinokana Unreported Case No. 16/2010.

Charles Obakeng Morule v Kenole Aleta Matlhaku Bahurutshe Ba Ga Gopane Tribal Court Unreported Case No. 04/2004

Ditile Pitso v Mogami Modiri Unreported Dinokana Chiefs Court Case No. 08/2003.

Frans Lesomo Mokobota v Ontibile Lillian Mokobota Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 01/2012

Gaboile Seaketso v Richard Mogwera Molele Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 02/2001.

Maduenyane Mokgaotsi v Maribana Mokgaotsi Tribal Court Bahurutshe Ba Lenloe Witlegat
(Could not sight the case number but judgment was given on 11/04/2006)

Magakala M. v Magakgala Magogwe Unreported Bahurutshe Ba Ga Gopane Unreported Tribal
Court Case No. 02/2012

Maphuye Onkemetse Sophy v Balebetse Maphunye Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 2012/09/10

Mmaisaka Andronica Molokwane v Boenyana Mafoko Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 10/2002

Molokwane Modise V Molokwane Semakaleng Tribal Court Of Bahurutshe Ba Ga Gopane
Unreported Case No. 6/2010.

Mongae Tiro V Sebogodi Israel Bahurutshe Ba Ga Gopane Unreported Tribal Court Case No.
15/2003

Moruakgomo David Molefe v Sello Solomon Mokgatlhe Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 03/2002

Phefo Bothonoka v Matlhoko Kaaru Bahurutshe Dinokana Unreported Case No.04/2011

Semakaleng Sophie Molokwane v Modise Molokwane Bahurutshe Ba Ga Gopane Tribal Court
Unreported Case No. 6/2010

Tlogelang Mosagale v Nkaki Mooketsi Unreported Case No. 2003/10/07.

Nigeria

Supreme Court Cases

Anekwe v Nweke (2014) LPELR-22697(SC).

Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle SC Suit No: SC.345/2012

Nwaigwe & Ors v Okere Unreported SC/392/2002

Obusez v Obusez SC/405/2001

Ojiogu v Ojiogu (2010) suit no. SC 235/2004.

Orlu v Gogo-Abite (2010) 8 NWLR (Pt 1196) 307.

Temile v Awani Supreme Court SC/79/96.

Ukeje v Ukeje Suit No SC/224/04.

Uwaifo v Uwaifo, (2013) LPELR-20389(SC).

Court of Appeal Cases

Danjuma Achor & Anor v Mahionu Aduku & Anor CAA Appeal No.CA/A/67/05.

Shaba Ndadile & Ors v Etsu Nupe & Ors CA/A/178/07.

Nwaigwe & Ors v Okere Court of Appeal Suit No.CA/PH/MISC/17/94.

Orlu v Gogo-Adebite Court of Appeal Suit No.PHC/171/86.

Ukeje v Ukeje Court of Appeal Suit No.CA/L/ 174 /93.

Obusez v Obusez Court of Appeal Suit No.CA/L/109/97.

Uwaifo v Uwaifo Court of Appeal Suit No.CA/B/264/2001.

Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle Court of Appeal Suit No.CA/I/118/99.

Timile & Anor v Awani Court of Appeal Suit No.CA/B/36/91.

Customary Court of Appeal Cases

Nwaigwe & Ors v Okere Unreported Appeal No.FCT/ CCA/OW/A/76/9.

Rifkat Dogo v Yuana Musa Unreported Appeal No.FCT CCA/CVA/9/2011.

Adamu Garba v Dorcas Adamu Unreported Appeal No. FCT/CCA/CVA/25/2013

Emenalo Omi v Chinwe Emenalo Unreported Appeal No. FCT /CCA/CVA/16/2010

Audu Adamu Huri & Ors v Shuaibu Ismaila Unreported Appeal No. FCT CCA/CVA/10/2007

Iorshashe V Ugbu & Anor Unreported Appeal No. FCT/CCA/CVA/4/2012

Felicia Ochuola Schneider v Chief Rolf Schneider Unreported Appeal No. FCT/CCA/CVA/10/2010

High Court Cases

Aragbui of Iragbui-Oba Olabomi & Anor v Olabode Oyewinle Unreported suit no. HIK/5/97

Mahionu Aduku & Anor v Danjuma Achor & Anor. Unreported AYHC/7/2001 Kogi State High Court.

Ndadili Mokwa & 11 Ors v Etsu Nupe & 4 Ors Unreported NSHC/MN/144/2001.

Ukeje v Ukeje Unreported Suit No. LD/184/83

Uwaifo v Uwaifo Suit no. B/570/90.(2005) 3 NWLR (Part 913) 479.

Obusez v Obusez HCI Suit No. ID/1064/91

Orlu v Gogo-Adebite RHC Suit No PHC/171/86

Awani v Awani HCW Suit no W/23/84.

Customary Court Cases

Ann Okekeocha v Chuks Okekeocha & Ors Unreported FCT/CC/NYA/CV/008/2012 FCT.

Audu Adamu Huri & Ors v Shuaibu Ismaila Unreported CV/39/2005.

Chinwe Emenalo v Emenalo Oni. FCT/CC/CV/DU/16/2010 CC.

Dorcas Adamu v Adamu Garba Unreported FCT/CC/YAN/CV/31/2013.

Haruna Kaye v Yusuf Sark Unreported FCT/JD/CC/Kwa/CV.15/11.

Rifkat Dogo v Yuana Musa Unreported FCT/CCK/CV19/2010.

Rolf Schneider v Felicia Schneider Unreported FCT/CC/GWA/CC/03/2008.

Shuaibu Ismaila v Audu Adamu & Ors Unreported CV/39/2005.

Ukauwa & Ors v Chineye & Ors Unreported FCT/CC/GWA/CV/13/2011.

Nwaigwe & Ors v Okere Unreported CC/O/75/88.

APPENDIX F

In The Supreme Court of Nigeria

On Thursday, the 12th day of July 1909

Before Their Lordships

Sir Willoughby Osborne	Chief Justice
Packard	Justice, Supreme Court
Winkfield		Justice, Supreme Court

Between

D.W. Lewis & Ors Appellant

And

Bankole & Ors Respondent

Judgement of the Court

Delivered by

Sir Willoughby Osborne. C.J.

Chief Mabinuori died in 1874, leaving a family of twelve children, the eldest of whom was a daughter. He was possessed of three piece of land: on one, the family compound, he lived with his wives and some of his children and domestics; on another he built houses for his eldest daughter and two of his sons; whilst the third was dedicated to the worship of the family fetish.

In 1905 an action was brought by certain of Mabinuori's grandchildren, including the issue of the children for whom separate houses were built, against certain of the occupants of the family compound who were daughters of Mabinuori and children of a deceased younger son.

The claim was for a declaration

- (1) that the plaintiffs were entitled, as grandchildren of Mabinuori, in conjunction with the defendants, to the family compound, and
- (2) that the family compound was the family property of Mabinuori deceased.

On the case coming on for trial before Acting Chief Justice Speed, the learned judge directed the issue to be tried whether the plaintiffs had received an amount which disentitled them to any share in the property in question, and after hearing the evidence delivered the following judgment on the 18th November, 1908: -

This is a case of very considerable importance not so much from the nature of the property in dispute or the magnitude of the interests concerned as from the fact that perhaps for the first time the Court is asked to make a definite pronouncement on the vexed question of the tenure of what is known as family property by native customary law, and the principles upon which that law should be enforced.

It is of course well known that the Colony of Southern Nigeria is under the sovereignty of the British Crown, and the law applicable to the Colony and in force within the jurisdiction of this Court is the Common Law of England, the Doctrines of Equity, and the Statutes of General Application which were in force in England on the 1st day of January, 1900. This is enacted by the 14th section of the Supreme Court Ordinance.

But by subsequent sections an important modification is introduced. By section 18 it is provided that law and equity are in all cases to be administered concurrently and that in case of conflict the rules of equity shall prevail over the rules of the common law, and by section 19 it is provided that the Court may observe and enforce the observance of any law or custom existing in the Colony and Protectorate subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and good conscience nor incompatible with any enactment of the legislature, and it is further provided that such laws and customs shall be deemed applicable particularly as between natives and natives and *inter alia* in causes and matters relating to the tenure and transfer of real and personal property.

It is clear therefore that this is a case in which the Court is entitled if not actually directed to observe and enforce the observance of native law and custom and it must not be forgotten that the native law and custom which the Court is empowered or directed to observe must have two essential elements: it must be existing native law or custom and not the native law or custom of ancient times, and it must not be repugnant to natural justice, equity or good conscience.

Now as to the first essential, native law or custom must be existing native law or custom and not the law or custom of a bygone age. It is perfectly well known that by strict ancient native law all property was family property and all real property was inalienable, and it is equally well known that a very large portion of the land upon which this town is built is now owned by individuals and that family ownership is gradually ceasing to exist. In a progressive community it is of course inevitable that this should be so.

The institution of communal ownership has been dead for many years and the institution of family ownership is a dying institution and it is idle to expect this Court at this time to make use of a power which was given to it in order to avoid or mitigate the individual hardship and injustice which would necessarily be incidental to the abolition of a primitive native system and the immediate substitution of modern methods, in order to perpetuate or bolster up what is at the best only an interesting relic of the past.

I do not wish for a moment to be understood to be speaking with any disrespect of the customs of your ancestors. There was much that was admirable and much which I hope will be retained for many years in the family system which they evolved, but it can hardly be denied that their ideas as to ownership of property were utterly unsuited to modern requirements, that these ideas have been dying a more or less natural death ever since the people of this country entered into commerce with European nations, and that sooner or later either the legislature of the Colony or this Court in the exercise of its equitable jurisdiction will have to give the *coup de grace* to the whole system.

As to the second essential I am not sure that I know what the terms "natural justice and good conscience" mean. They are high sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the terms.

But with regard to equity the case is quite different. The rules of equity are, or ought to be, perfectly well known to this court and if a native law or custom is found to be repugnant to the fundamental rules of equity it is absolutely the duty of the Court to ignore it. I have over and over again expressed the opinion in this Court and I repeat it with all the emphasis which I can command that any attempt to revive an obviously stale claim, to constitute a state of affairs which has been openly or tacitly abandoned by all concerned, to upset a settlement which has been acquiesced in by all parties for a long time and upon which all parties have by mutual even though tacit consent acted for a number of years, is repugnant to the fundamental rules of equity and should not be countenanced by this Court on the ground that it is in accordance with native law or custom, however harmless, nay, however admirable, that native law or custom may be.

So much for general principles and now for the facts of this case.

The property in dispute is a block lying on the north side of Bishop Street between the Marina and Broad Street known as Mabinuori's Compound.

Together with many properties in the vicinity it was many years ago acquired by Mabinuori and has ever since been occupied by members of his family.

An attempt was made, I don't quite know for what purpose, to show that the land originally was Oshodi's land, but be that as it may it was granted by the Crown to Mabinuori in January, 1869, on which date also a crown grant to the same Mabinuori was issued for another property lying south of the premises now occupied by Messrs. Gottschalck on the other side of Broad Street which is referred to throughout these proceedings as Fatola's compound.

Mabinuori was a man of wealth, influence and position and had a large family for whom from time to time he made provision as occasion arose by placing them in possession of houses or rooms erected on one or other of his properties.

His eldest son was one Fagbemi who also won a position of wealth and influence in the community, who in fact before his father's death was probably the wealthier and more influential of the two.

In any case it appears on one occasion he paid the old man's debts and he certainly obtained a crown grant for a considerable property in Bishop Street behind Messrs. Gottschalck's premises which was in all probability originally part of the Mabinuori's estate as early as August, 1868, or a few months before the issue of the crown grants for the properties above mentioned to Mabinuori himself.

Fagbemi then, it is clear, however he acquired this property, whether, as is alleged in evidence and as I am much inclined to believe, by gift from Mabinuori or in any other way, had attained an independent position before the father's death and upon the death of Mabinuori which took place in 1874, was recognised as the unquestioned head of the family.

As to the other members of the family the defendants or their ancestors were all settled on the property in dispute. Fatola, Oduntan and Odubi were settled on what is known as Fatola's compound. Fagunwa was settled elsewhere on

a property which was originally purchased by Layemi, who was one of the Mabinuori's wives, either on her own account or as a member of the family, and for which a crown grant was issued to her in 1869.

This was the position at Mabinuori's death. Now I have no hesitation in saying that Mabinuori never intended his property to devolve in any other way than in accordance with the ordinary native custom and it is quite possible that had they thought fit to do so all his descendants or their representatives might have claimed and made good their claim to share in the whole inheritance at his death.

But what actually happened? With the exception that Fagbemi was the recognised head of the family instead of Mabinuori and as such took the usual part in the performance of the family duties and no doubt being a wealthy and influential man occasionally assisted his less fortunate relations with his purse, everything went on as before.

No attempts were made to re-allot the dwelling houses but each branch of the family continued to occupy the premises assigned by Mabinuori or acquired before Mabinuori's death.

This is a substantially accurate description of the position at Fagbemi's death also, though there is evidence of isolated acts of ownership exercised or attempted to be exercised by certain members of the family outside the limits to which they were apparently generally content to be confined. For instance Fagbemi himself for a time occupied certain portions of the compound in dispute as a salt and spirit store, though it is by no means certain that this occupation did not commence before Mabinuori's death, and it is clear to my mind that it never was intended or understood to involve a claim to ownership on Fagbemi's part. Similarly David Lewis tried once to build on the property but was restrained by his own mother Fatola, and James Lewis had a horse, a few fowls and a few empty cases on the premises at a recent date. Fagbemi died in 1881 and after his death Ben Dawodu became if not the recognised head of the family at all events the most influential member. Still the position remained unchanged.

Still the same people or their representatives continued to occupy the same premises and still no attempt was made to re-allot or in any way interfere with the occupation.

Certain differences of opinion did arise between the occupants of the property in dispute and Ben Dawodu, but there was nothing to show that there was any desire or any intention on the part of any of the family to alter existing arrangements. And so the situation continued up to the commencement of this action.

Now to these facts I am asked to apply strict native law and custom and to declare that the property has always been the family property of Mabinuori's family and that defendants who have been in undisputed occupation for upwards of 30 years should now be told that they are only joint owners with the rest of the family. I am asked to throw the property into the melting pot of an acrimonious family feud. I have no doubts that plaintiffs have native law and custom on their side. I mean native law and custom as it was understood and possibly applied 40 years ago, but I decline to say that it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it.

On the ground therefore that by tacit mutual arrangement and acquiescence of all parties extending over a number of years these various properties have been separated and come to be considered as separately owned, I find on this issue in favour of the defendants and as this finding is necessarily fatal to plaintiffs' claim, I give judgment on the whole action for the defendants with the costs of the hearing before me. I say nothing about the previous hearing because it was in my opinion not completed.

The costs I assess at 50 guineas.

Against this judgment the plaintiffs appealed.

Williams Ajasa for the appellants.

Shyngle and Foresythe for the respondents.

On the 15th May, 1909 judgment was delivered in the Full Court.

In this action the claim of the plaintiffs was for a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to all that piece or parcel of land situate and lying between the Marina and Broad Street in Lagos being the property of the late Mabinuori deceased and also that the said property be declared the family property of the said Mabinuori deceased.

The wording of the first part of the claim would seem to imply that the plaintiffs claim a declaration that they are entitled to the joint ownership of the land in dispute as tenants in common in equal shares with the defendants, and this is evidently the view that was taken by the learned judge whose decision is now appealed against. Yet at an early stage of the proceedings before the late Chief Justice Nicoll, defendants' counsel informed the court that the only point then in dispute was who was to be head of the house, and it was not until one of the plaintiffs had insultingly declined to accept the advice of the chiefs nominated by the court to advise the family in their election that the defendants seem seriously to have claimed that the land in dispute was their separate property to the exclusion of the other members of the family. A

protracted trial before Chief Justice Nicoll was unfortunately interrupted by his death, and fresh proceedings were started before Acting Chief Justice Speed. The defendants then admitted that the land in dispute was Mabinuori's property, but claimed that the plaintiffs were not entitled to any share therein because they or their ancestors had already received all the shares to which they are entitled.

The court then directed an issue to be tried whether the plaintiffs had received an amount which disentitled them to any share in the property in question. On the ground that by tacit mutual agreement and acquiescence of all parties extending over a number of years the property in dispute, together with the other properties of Mabinuori had been separated and had come to be considered as separately owned, the court found on this issue in favour of the defendants, and gave judgment for them on the whole action.

It is contended that this finding was against the weight of evidence, and with that contention I agree. Three properties are admitted to have belonged to Mabinuori at the time of his death, viz; Fatola's compound, the Oke Popo property, and the land in dispute. It is certainly the fact that Fatola, Odubi and Oduntan, all children of Mabinuori, have continuously occupied Fatola's compound; but the crown grant of the land was taken by Mabinuori, who placed them on the land, in his own name, only five years before his death; and the deed was retained by the head of the family, and not by Fatola, until somewhere about 1888, when it was eventually, after a short period of custody in the hands of Layemi, Fatola's mother, who unsuccessfully claimed part of the land in dispute for herself, handed over for safe keeping to one of the Lagos chiefs together with the crown grant of the land in dispute. Moreover, the possession of Fatola, Odubi, and Oduntan, and their children is not possession adverse to the family of whom they form part.

The property at Oke Popo was evidently not treated as separately owned, for a portion of it was sold to meet some family expenses. There is to my mind abundant evidence to negative the conclusion that the compound in dispute was ever looked upon as separately owned by the defendants. The present occupiers include besides the defendants themselves a daughter of Fatola and sister of the plaintiff Lewis who lives in one of the largest dwellings in the compound, formerly the habitation of her grandmother Layemi; a son of Odubi, whose family are also amongst the plaintiffs; one of Mabinuori's wives; and two of his domestics. There are stores on the land which Fagbemi, Mabinuori's elder son, and head of the family, made use of for trading up to the time of his death in 1881, without paying any rent, and which was subsequently used for some time by Ben Dawodu, his eldest son, who was looked on as the head of the family, also without payment of rent. When these stores were let to European firms in Ben Dawodu's lifetime it was he, and not the defendants, who entered into the agreements in his own name, and for a while collected the rents of both, though a year or two before his death in 1900 it was arranged that the defendants should take the rents for the Broad Street store. Fagbemi also built a store on the land, and brought Docemo, one of Mabinuori's children, to reside on the land, and had actually collected the materials for building in the compound houses for his sisters Faleye and Apotun, two of the defendants, when he died. I can find as against these facts no evidence to show that the land as a whole was ever looked on as the sole property of the defendants, though their right of occupation, which again is not adverse to the plaintiffs, has always been acquiesced in. I do not, however, consider that the plaintiffs have proved their claim to the relief asked, and had that claim been for absolutely equal ownership rights as tenants in common with the defendants, entitling them to disturb the defendant's possession, I would have had no hesitation in following the learned judge in the court below, and finding that the application of such a native law would be inequitable. But before this Court the extent of the claim has been very considerably modified, and the plaintiffs now admit that by native custom they are not entitled to disturb the defendants in their rights of occupation; they still, however, claim a right to occupy any part that falls vacant, a right of ingress and egress, and, what is really the cause of all these proceedings, a right to be consulted before alienation, and to share in the proceeds. The value of the site of the land at the present time is considerable, and is likely to increase with the expansion of Lagos. Plaintiffs' counsel could only assert their rights in a general way, and defendants' counsel disputed the correctness of their pronouncement of the native law. There is no evidence, and nothing on the pleadings, to show what are the exact rights claimed by the plaintiffs to be exercisable by native law or custom, and these must be definitely ascertained and they must fall within the provisions of section 19 of the Supreme Court Ordinance before this Court can give effect to them. A Court of Appeal cannot be expected to take the evidence, and I am of opinion that the best course to ensure the determination of all the matters in dispute between the parties will be to remit the action to the court below to complete the hearing by taking evidence as to the native law or custom, if any, governing the circumstances of the case, and to pronounce judgment on the whole claim after consideration of the applicability of such native law or custom if any, under section 19 of the Supreme Court Ordinance.

Judgement of Winkfield, J
Read by Packard, J.

This is an appeal from the judgment of the Divisional Court of the Western Province.

The plaintiffs who represent the children of Fatola, Fagbemi, Odubi, Oduntan and Fagunwa, children of Mabinuori deceased, claim a declaration against the defendants, children of Mabinuori deceased and the children of Soni Dosunmu deceased a child of Mabinuori, that the children of Fatola, Fagbemi, Odubi, Oduntan and Fagunwa are entitled in conjunction with the defendants to a piece of land between the Marina and Broad Street, Lagos, being the property of Mabinuori, deceased, and also that the said property be declared the family property of the said Mabinuori deceased.

The defendants contended in the court below and before this Court that Fatola, Fagbemi, Odubi, Oduntan and Fagunwa received parts of Mabinuori's property from him and are thereby precluded from claiming any interest in the property in

question. From the evidence it appears that Mabinuori acquired some time ago — probably about 1851 — the property in dispute and certain other properties in the vicinity.

He built a house upon the land in dispute and resided there with his wives, children, and domestics.

His eldest son Fagbemi gained a position of wealth some time before the father died and occupied a piece of land at Bishop Street with his wife and some of Mabinuori's domestics. He acquired several pieces of land. Among them he acquired the piece at Bishop Street as his own property. The crown grant dated the 20th August, 1868, was made out in the name of Ben Dawodu, a name by which he was also known.

Fagunwa was placed by Mabinuori on a piece of land which was subsequently expropriated by the Government. Fagunwa then went to reside on a piece of land at Balogun Street which was owned by his mother, Layemi; Layemi paid for the land and the crown grant was made out on her name. Fagunwa died at Balogun Street. His children lived there at the commencement of this action. Upon another piece of land Mabinuori built houses for his daughter Fatola and his sons Odubi and Oduntan. There is no evidence to show that he intended that they should be the owners of the land. I consider that they had the right only to occupy the land as members of Mabinuori's family.

For this piece of land Mabinuori obtained a crown grant in his own name in 1869.

I do not consider that the fact that Mabinuori provided houses for his children disentitled them to interests in the land in dispute.

At Mabinuori's death the piece of land which he owned became family property. The defendants, as his daughters, or their fathers or mothers as his children were entitled to reside on the land in dispute subject to and in accordance with native law and custom.

After Mabinuori's death, Fagbemi became head of the family. Fagbemi died in 1881. While head of the family he used two stores on the land and paid no rent for them. He was recognised by the members of the family as their head. After Fagbemi's death, Ben Dawodu assumed the headship. His position was not challenged. He used the stores as his father Fagbemi had done, and also did not pay rent for them. He repaired Mabinuori's house on the land in dispute and, generally, acted as a head of a family when circumstances required. It would seem that both Fagbemi and Ben Dawodu used the stores in pursuance of their rights as heads of the house. When Ben Dawodu was head, he received the rents of one of the stores, and used them for his own purposes.

He was charged with wasting the family property, and an arrangement was made under which the defendants or some of them received the rents. Ben Dawodu died in 1900 and after his death the defendants who are daughters of Mabinuori assumed the management of the land in dispute. They received the rent of a shed and a blacksmith's shop. In 1906 they entered into an agreement with a European firm for the lease of one of the stores on the land. James Dawodu, a son of Fagbemi, objected. In July, 1905, a family meeting was held at which the defendants claimed the land as their property. The writ of summons was issued on the 19th December, 1905. When Ben Dawodu died in 1900 no head of the family was elected. To the fact that there was no head of the family the dispute which had arisen between the members was no doubt due.

When the case first came on in the court below, the Court was informed by counsel for the defendants that the only matter in dispute was the question who should be head of the family. This was on the 24th April, 1906. When the case next came before the Court for trial on the 27th December, 1906, the defendants then asserted that the land was theirs. The defendants have no doubt occupied the land in dispute for many years but in my opinion they have been in possession as members of the family of Mabinuori in accordance with and subject to native law and custom. They have not been in possession adverse to the rights of the other members of the family.

Under native law the plaintiffs have joint interests on the land with the defendants. I can find no reason, based upon any law or the principle of equity, why native law should not be applicable in this case. The defendants have the right to occupy the land in dispute subject to and in accordance with native law but they cannot alienate the land without the consent of the chief member. In my opinion the judgment of the court below should be reversed and judgment entered for the plaintiffs.

Judgement delivered by
Packard, J.S.C

The plaintiffs' claim is twofold

- (1) a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to all that piece or parcel of land situate and lying between the Marina and Broad Street, Lagos, being the property of the said Mabinuori deceased.
- (2) that the said property be declared the family property of the late Mubinuori deceased.

Pleadings were delivered and various events and proceedings took place which it is unnecessary to specify in detail, until eventually the whole matter came for trial before the learned Acting Chief Justice. He then made an Order under Order 32 rule 2 in the following terms:

"The first question to decide is whether the plaintiffs have received an amount which disentitled them to any share in the property in question. The Court orders that issue to be tried first."

The issue was tried accordingly and the defendants began. At the close of the defendants' evidence on this issue the following note appears upon the record:

"The defendants' case on the issue before the Court - subject to any reference which the Court may make under section 111 of the Supreme Court Ordinance as to the native custom applicable."

Evidence was then given for the plaintiffs on this point and the learned judge on this preliminary issue found in favour of the defendants and decided that they were estopped by their own conduct from bringing this action. In his judgment he says

"I find on this issue in favour of the defendants by tacit mutual agreement and acquiescence of all parties extending over a number of years these various properties have been separated and came to be considered as separately owned. No doubt the plaintiffs have native law and custom on their side, but I decline to say it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it"

So far as actual residence on the property by the defendants is concerned, I think there is abundant evidence to support the conclusion of fact, and I gather from the arguments of counsel for the plaintiffs that they do not - even at this stage - claim any right to eject the defendants from these portions of the property they occupy or possess as residence. But apart from the question of residence there are portions of the property which have been used or let as stores and for trading purposes and in the profits therefrom the plaintiffs claim to participate in accordance with native law and custom and it appears from the evidence that these rights have not only been asserted during the period in question, but have in fact been exercised from time to time by, at any rate, one branch of the families who are plaintiffs and that there have been constant disputes on this point which culminated in the present action. I think therefore that the finding of fact that the plaintiffs have acquiesced for a long period in the whole of the property in dispute being considered as separately owned by the defendants is against the weight of evidence.

I am also of opinion that such acquiescence as has been established in this case does not in law preclude the plaintiffs from bringing this action.

The principles upon which the rule of equity may be applied in such cases are *set out in Black v. Gale* (55 Law Journal Chancery 559) and *Chadwick v. Manning* (1896 Appeal cases 331). See also *Palmer v. Moore* (Law Reports 1900, Appeal cases 293). I have not been able to find any case in which this doctrine of equity has yet been carried as far as the case before us. I am therefore of opinion that this appeal should be allowed and that the defendants having failed on the preliminary issue the action must proceed, and must be remitted to the Divisional Court to try the remaining issue.

At the informal discussion yesterday on the issues raised, counsel for the appellant were good enough to indicate to us in general terms some of the benefits and obligations which under native law might possibly accrue to the parties in respect of this property. No doubt evidence will be adduced on these points in the Divisional Court and it would be premature at this stage of the proceedings without any sufficient evidence or findings of fact before us to express our opinion as to the native law or even to assume without proof that under the peculiar circumstances of the case there is any native law applicable at all.

The Full Court ordered that the judgment of the court below on the issue tried under Order 32 rule 2 be set aside, and that the cause be remitted to the court below to take additional evidence as to what native law or custom, if any, would regulate the several matters in dispute, and such further evidence as the Court may think proper, and either to pronounce final judgment on the merits, or to state a case for the opinion of the Full Court.

The case was resumed in the Divisional Court before Osborne, C.J., and conflicting evidence was adduced as to the native law applicable.

On the 29th June, 1909, the following Chiefs of Lagos were in attendance, viz: Chief Ojora, Chief Eletu Odibo, Chief Oloto, and Chief Onitano, white-capped chiefs, and Chief Ashogbon, a war chief.

The Court caused them all to be sworn and addressed them as follows:

"You are here as expert witnesses on the native law of Lagos, and I want you to judge the cases I am going to put before you as if you were sitting to judge them in a native court. You may deliberate before giving your answers, but I shall take a separate answer from each of you, and of course that answer will be on oath."

The Court then propounded certain cases, which summarised the different views put forward, and were framed with regard to the actual facts. The first was as follows:

"Suppose a man whom we will call Ladipo was formerly a slave, but afterwards became a free man and a rich trader, and bought two pieces of land, one a large piece and the other a small piece of land. He has two wives and by them he has four children. The eldest child Layinka is a daughter, the next child, Bankole, is a son, the third is Ayodele, another daughter, and the youngest is Oke another son.

"Ladipo builds himself a big house on the part of his big piece of land, and builds a room in the compound for each of his two wives. Bankole, his eldest son, grows up and Ladipo gives him a wife, and builds him a house on behalf of the smaller piece of land. He also finds a husband for his eldest daughter Layinka, and builds her a house on the other half of the small piece of land. Then Ladipo dies. At the time of his death Layinka was living in the house built for her. Ayodele, the unmarried daughter, was living in her mother's room in the compound, and Oke, the youngest son was living in the big house with his father.

"The four children meet together after the father's funeral, and Layinka, the eldest daughter, says "I am the eldest child, and by native law I am entitled to be head of the family and to give orders in our father's compound"

"Bankole then says "You are wrong, my sister. I am the Dawodu, eldest surviving son of my father, and by native law the Dawodu is the proper person to be head of the family and to give orders in his father's compound".

"Ayodele, the youngest daughter, then says "My brother and sister you are both wrong. Our father gave you your portions in your life, and you cannot claim to share the compound with Oke and myself. I am older than Oke and the eldest child living in the compound, therefore it is I who by native law ought to give orders in the compound".

"Oke, the youngest son, then says "Sisters and brother you are all three wrong. Ayodele truly said that you Layinka, and you, Bankole, have had your portions in our father's life, and therefore cannot share in this compound. But Ayodele is a woman, and by native law a woman can only live in her mother's room, and cannot give orders in her father's compound. I, therefore, am the proper person to rule this compound".

"They disagree, and come before you chiefs to settle the case. How would you decide it?"

The chiefs asked to retire to deliberate, and were absent for about eight minutes. When they returned, Chief Ojora said,

"As your Honour has explained the position, we understand. If the parties came to us and related the matter we would go and view the houses. And when we see the one the father has given to the eldest child, and to the child following the elder, we will go and see the compound where the father was living with his two children. If we find that the house which is given to the two elder children is large enough for them, and if we find the compound where the father died just equal in size, we will tell the two children who have not been provided for in their father's lifetime to take the remaining land where the father was."

The Court explained that the father built a big house on a big plot of land for himself, and the land where he built for his children was smaller. Chief Ojora then said

"If we find that the father's land is bigger than that given to the children we will give a portion of the father's compound to the children who have not been provided for, and the other part to the children who had had houses built for them."

By Court "Should you try to make the shares equal ?

A. Yes, so that there should be no dispute, the woman sharing equally with the men.

Q. And who would be the proper person to give orders in the father's compound in such case?

A. Bankole, who is the Dawodu

Chief Eletu said

"I agree with the Ojora except on one point. If the compound is divided it will no longer be a compound, and each one will have authority in his own portion"

Q. But suppose there is a compound yard, and one well for all the compound? Who is the proper person to give orders about the well?

A. Layinka will have the authority over the well and the yard

Chief Onitano and Chief Oloto intimated that they agreed with Chief Ojora.

Chief Ashogbon said

"I say that the well will be under the authority of the person in whose share it is.

"If any row comes they should go to the eldest sister, and the Dawodu will be there also. The house will be divided, but you cannot split the eldest child (meaning that the eldest will remain the eldest and have authority as such)."

The Court then asked

"Is there any difference between the father's house and the other houses? Can it be divided up?"

To which Chief Ojora replied

"It would be divided as I have suggested. If the father has a big compound, they will leave the father's house for all the children to meet in and to discuss matters relating to the family."

The other chiefs concurred.

The Court then said:

"Now I am going to put another case about the same man Ladipo and his four children. Suppose that after Ladipo's death Bankole the eldest son was accepted as head of the family's compound without any dispute. Then Bankole dies first of the children leaving a son. Who would be the proper person to succeed Bankole to give orders in the father's compound?"

Chief Ojora replied

"Bankole's son would have no right to give orders in the house. The eldest child, in this case Layinka, would be the proper person to give orders, but Bankole's son would be consulted about the compound."

All the other Chiefs agreed with this view.

The Court then asked

"Suppose there had been no palaver at Ladipo's death, but Bankole had been accepted as head of his father's compound till he died. Layinka is then the proper person to give orders. Now in part of the compound is a shop, which Layinka wants to let to a European firm of merchants. Can Layinka let it without consulting the other members of the family?"

Chief Ojora answered

"If it has not been divided, one person cannot let it."

By Court

"Suppose Layinka and Ayodele want to let it to one firm, and Bankole's son and Oke want to let it to another firm?"

Chief Eletu:

"They will settle the matter between themselves."

Q. "But suppose they cannot settle it between themselves?"

Chief Ojora:

"If they cannot settle it, the chiefs will go and inspect the property and partition it."

The other chiefs assented to this.

By Court:

"Can the father's house, which has been left for all the children to meet in, be let or sold?"

Chief Ojora:

"It can't be sold, but it can be let with the consent of all the members."

To this the other chiefs assented.

Q. "Can the family sell it, if they all agree?"

Chief Ojora:

"No, they cannot sell it."

To this also the other chiefs assented.

Q. "Suppose the Government had come and taken the family house for public purposes, and given £1,000 for it, to whom will the money be given?"

Chief Ojora:

"To the children, in equal shares."

Q. "Suppose Bankole had died when the Government acquired the property, would his children share his share?"

Chief Ojora: "Yes."

Q: "Suppose Bankole had property of his own which he acquired, and his children succeeded to that, would that be taken into account in dividing the £1,000?"

Chief Ojora:

"It will make a difference. If Bankole had got money and had become rich, it must have been through his father."

The other chiefs assented.

Q. "Suppose Ladipo in his life lost a lot of money just before he died, and mortgaged his house, and before Ladipo died Bankole paid off the mortgage. Would Bankole's children then be entitled to share in the £1,000?"

Chief Eletu:

"They would have a share in it, but not on account of the debt Bankole paid. I now say they would have no share in it."

By Court:

"Chief Ojora, what do you say?"

Chief Ojora:

"If Bankole pays his father's debt, it is through his father's influence that he became rich. But if Ladipo mortgaged the house, and Bankole redeemed it, and all the family knew, then Bankole's family would be entitled to share."

Chief Onitano and Chief Oloto agreed with Chief Ojora, but Chief Ashogbon said:

"We cannot give it to them, because their father has got his own share."

The Court then put the following case :—

"Ladipo built himself a big house in his big compound, and had built Bankole a smaller house on his small piece of land. Ladipo dies, and Bankole becomes head of the house without any palaver. Bankole marries and has ten children, and his house gets too small. Then Bankole dies and the ten children find that Bankole's house is too small. There is still Ladipo's compound left, and the greater part of it is not built upon. Have Bankole's children got a right to come and build upon Ladipo's compound?"

Chief Ojora gave the following answer, with which the other chiefs agreed:

"The aunts and uncles who remain, if they agree, will allow the grandchildren to come and build. But if they don't agree Bankole's children may not build in Ladipo's compound, and if they find their father's house too small, they must go elsewhere"

The Court finally asked the chiefs:

"Suppose that after Ladipo had died Bankole was accepted as head of the house, and then he died, and Layinka was then living with her husband outside the compound, will she still be the proper person to give orders in Ladipo's house, and be head of his house?"

Their unanimous answer was in the affirmative.

The following judgment was delivered on the 12th July, 1909:

Osborne, C.J.

This action has been remitted to this Court to take additional evidence as to what native law or custom, if any, would regulate the several matters in dispute, and such further evidence as the Court may think proper, and either to pronounce final judgment on the merits, or to state a case for the opinion of the Full Court.

It is advisable once again to recapitulate briefly the principal facts. Chief Mabinuori, once a slave, but afterwards a person of wealth and importance, died in the year 1874 leaving a large family of 12 children, 5 sons and 7 daughters. His eldest child, Fatola, was a daughter; his eldest son was Fagbemi. He is said to have died possessed of three pieces of land; one, the subject of this action, which I will call the family compound, is a strip between Broad Street and the Marina, where he lived himself with his wives and some of his children and domestics, and on this piece of land are two shops, one in Broad Street and the other on the Marina. On a second piece of land in the same neighbourhood, he had built houses for his eldest daughter Fatola, and for two of his sons Odubi and Oduntan. The third was a piece of land in Oke Popo dedicated to the worship of the family fetish. Fagbemi succeeded as head of the family on the death of his father, and though he did not reside in the family compound he made use of the shops. He died in 1881, and for a while his eldest son Benjamin Charles Dawodu appears to have been accepted as head of the family, but he evidently got into financial difficulties, and towards the end of his life dispute arose between him and his aunts as to the rents of the shops in the family compound. Benjamin Dawodu died in 1900, and his brother, the plaintiff James Dawodu, now claims to be head of the family, all Mabinuori's sons having died, and he being the oldest surviving son of Fagbemi. Since Fagbemi's death, relations between the daughters of Mabinuori and his son's children have grown much more strained, and vain attempts have been made to settle matters through the intervention of the Lagos Chiefs; the principal bone of contention has always been the leasing of the shops, which have been rebuilt and improved, and the collection of the rents. Ultimately in 1905 this action was started in which the children of Mabinuori's eldest daughter Fatola, and of his sons Fagbemi, Odubi, Oduntan and Fagunwa, all of whom are now dead, claim as against the surviving daughters of Mabinuori and the children of Docemo, a deceased son, a declaration that they the plaintiffs are entitled as grandchildren of Mabinuori deceased, in conjunction with the defendants, to the family compound, and a further declaration that the family compound is the family property of Mabinuori deceased. After protracted litigation unfortunately lengthened by the death of Chief Justice Nicoll, Acting Chief Justice Speed decided against the plaintiffs on an issue that they had received in Mabinuori's lifetime an amount which disentitled them to any share in the family compound, and gave judgment on the whole action for the defendants.

This judgment has been upset on appeal by the Full Court, who have remitted the action to this Court for the purposes above stated, viz:

- (1) to ascertain the native law or custom, if any, which would regulate the matters in dispute, and
- (2) to pronounce final judgment on the merits, or to state a case for the full Court's opinion.

Power has been expressly reserved to this Court to take into consideration all the evidence previously given in the Divisional Court, and all matters included in the appeal records, so the evidence which has been confined to the ascertainment of the native law is applicable.

Now native customary law is always a difficult law to apply in this Court; it is unwritten, and so-called experts are usually forthcoming to bear testimony that it corresponds exactly with the views put forward by the side on whose behalf they appear. Real experts are few, and fewer are those who have made it special study, and it is not as a rule until some matter arises in which the facts are either somewhat peculiar or involved, and one of the parties is dissatisfied with the ruling of the native authorities on the facts, that the intervention of this Court is asked.

I have during thirteen years experience of West Africa been concerned in one capacity or another with several cases in which native customary law has been the subject of judicial investigation; and in nearly every case I have found that there are general underlying principles not difficult to understand, and obviously based on the primitive requirements of the community. In some instances those principles have been modified, and even departed from, as the result of contact with European methods; indeed, one of the most striking features of West African native custom, to my mind, is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individual characteristics. The great danger in applying it in this Court is that of crystallising it in such a way that it cannot be departed from in cases where expediency demands, and where natives themselves would depart from it; and I therefore preface my findings with the remark that they are intended as findings of the general principles which govern native custom in Lagos at the present day, and not as hard and fast findings of immutable native law. The evidence before me was mainly directed to two main points: —

- (i) Who is the proper person to be head of a family?
- (ii) What are the rights of members of a family in family property?

Incidentally, also, arose the question whether the receiving of a portion by a child in the father's lifetime precludes him from sharing in the distribution of the property after the father's death, and whether family property is capable of alienation.

Evidence has been brought by the plaintiffs from outside Lagos, in parts where Yoruba law and customs are less affected by European influence; and they also called witnesses as exponents of the old time law of Lagos; but the defendants relied on the present Lagos chiefs. I feel bound to give very great weight to what the white capped chiefs said in answer to the test cases put before them; their replies were given under the sanctity of an oath, and with a full knowledge of their responsibility to the native community; and though I have no doubt that the native law of Lagos has been influenced by the alteration of circumstances since the cession, I have no reason to doubt the correctness of the chief's pronouncement of the customs which exist in Lagos at the present day. Moreover, I was much impressed with the fair and business-like methods which they said they would have adopted if the case had been before them for decision. That the present Lagos customs are modifications of the original Yoruba customs there is little reason to doubt; and the evidence as to those Yoruba customs is of undoubted value, as showing how far the general principles remain intact in Lagos, and how far they have been modified to meet present requirements.

The first point for consideration is as to headship of the family, and the main question here at issue is whether or not a woman can be head. The supporters of the old school and the Yoruba witnesses deny this: but the Lagos chiefs hold a contrary view. Lagos is not the only part of His Majesty's dominions where the female sex are seeking for greater recognition of their capabilities; and seeing that a wise and great queen held sway for long years over the British Empire, there seems no reason why, on the mere ground of sex, a Lagos woman should not be capable of managing the domestic concerns of a family compound. There seems to be no importance attached in Lagos to the headship of a family, outside the family circle, and the attempts that have been made to show that a male must be head for political reasons, have not convinced me. I am moreover, satisfied that the use of the term "Arole," on which so much stress was laid to show that a woman could not be "Arole," is confined in Lagos to the heirs of chiefs. There is practically a consensus of opinion that on the death of the founder of a family the proper person to be head of the family is the "Dawodu" or eldest surviving son. This seems to be a well established rule both in Lagos and in other parts of Yoruba land. It is after the death of the Dawodu that we begin to find variations; according to the plaintiffs' witnesses, by Yoruba custom the other sons of the founder of the family are taken in turn, and then the sons of the Dawodu and other sons' sons, the headship being ever kept in the male line. One explanation of this rule is that the women on marriage go and live with their husbands; another is that a woman is only "part of a man," since a man may have several wives, but a woman can have but one husband; and Yoruba proverbs have been quoted, foretelling the disruption of a house under female rule.

On the other hand the view of the Lagos chiefs is that it is the eldest child, whether male or female, who becomes head after the Dawodu.

There is nothing inequitable in this recognition of women's rights; and the town of Lagos bears striking testimony to the honour here accorded to women in the names of the square wherein this Court house stands, and one of the principal markets, both called after women of wealth and importance in bygone days. I must accept the pronouncement of the Lagos chiefs in this matter, and I declare that the proper person to be head of Mabinuori's family is the eldest surviving child of Mabinuori, that is, the defendant Fakeye. There are certainly no reasons for making exception to the rule in her case, for the chiefs appointed by the Court to go into this matter described her as appearing to them "gentle and intelligent and capable, in fact, she should be the mother and the guiding head of this family."

The next point is to consider what are the rights of the members of a family in family property, for the effect of the judgment in the Full Court is to declare the family compound family property.

The following rights have been claimed by the plaintiffs:

- (i) a right to be consulted before the family compound is leased or otherwise dealt with;
- (ii) a right to share in any rents or profits accruing from dealings with the family compound;
- (iii) a right to build on any unoccupied part of the family compound;
- (iv) a right of ingress and egress.

The right to be consulted is in my opinion fully established, but this does not mean that each individual grandchild is entitled to participate in the consultation; the evidence goes to show that there can only be one voice and one vote for all the children of a deceased child.

The general principle which appears to govern the native custom in Lagos with respect to family property is one well known to this Court, and by which the Court is bound, VIZ: that equality is equity, and on the family council each branch is entitled to equal representation.

A further question arises as to what will happen in the event of disagreement which is incapable of settlement between the parties, and in such case, according to the evidence of the native chiefs, the property will be partitioned.

After inspection of the property in dispute, I am convinced that a partition would not be in the best interests of Mabinuori's family; the site as a whole is a valuable one, in a business quarter, with frontages on two busy thoroughfares, but if it is cut up into little pieces those that abut on the main street will be worth more than the others, and, moreover, the several little pieces would be likely to fetch less in the aggregate than the land as whole. If, after the decision in this action, the members of the family continue to disagree, it appears to me that the best course will be for the Court on application being made to it by any of the parties to settle the terms for leasing the stores and such other part of the compound as it is desired to let, and to appoint the receiver of the rents, and give such other consequential directions as may be necessary. With reference to the right to share in rents and profits arising from the leasing, sale or compulsory acquisition of the family compound, I hold that subject to shares given to children in Mabinuori's lifetime being brought into account, so as to ensure equality of division between the respective branches of the family, all the different branches will have a right to participate.

Repairs to family property must, however, be paid when necessary from rents arising from the property before those rents are divided. It is, of course, impossible for me at the present stage to say what precise share each branch of the family is to take; that depends on questions of valuation which have not yet been gone into.

I hope, however, that the members of the family council will be able to settle this matter amongst themselves without the assistance of the Court.

The right to build on any unoccupied part of the family compound hardly becomes a matter of serious discussion, as the erection of additional buildings is obviously impossible from the point of view both of sanitation and comfort; but I see no reason to doubt the correctness of the statement made by the Lagos chiefs that the grandchildren have no such right without the consent of their uncles and aunts.

I am unable to find sufficient support for the alleged general right of ingress and egress. There may be occasions when members of the family assemble for family purposes in the family house, and on such occasions the members of the family entitled to attend would, of course, have such rights of ingress and egress as are necessary to permit of their attendance. The members of the family council might also be expected to have a right to enter and inspect the state of repair of the family compound. But even if such rights do exist by native custom and I question whether this point has even been raised before it is clear that the exercise of the rights must not interfere unnecessarily with the quiet enjoyment of the persons inhabiting the family compound.

There is one other point to which I must allude, and that is whether by native customary law the family house can be let or sold. According to the Lagos chiefs, the present custom is that it can be let with the consent of all the branches of the family, but cannot be sold. The idea of alienation of land was undoubtedly foreign to native ideas in olden days, but has crept in as the result of contact with European nations and deeds in English form are now in common use. There is no proposal for sale before me, so it is not necessary for me now to decide whether or not a native custom which prevents alienation is contrary to section 19 of the Supreme Court Ordinance. But I am clearly of opinion that despite the custom, this Court has power to order the sale of the family property, including the family house, in any cause where it considers that such a sale would be advantageous to the family, or the property is incapable of partition.

The first claim of the plaintiffs was for a declaration that they are entitled as grandchildren of Mabinuori deceased in conjunction with the defendants to the family compound.

As was pointed out in the Full Court, the wording of the claim seems to imply absolute equality as common owners and it was only when the appeal was being heard that a claim limited to the right above specified was first put forward.

Nothing in this judgment will affect the possessory rights of those members of the family who were actually living in the family compound when this writ was issued, or who had houses or rooms which they were then entitled to occupy for residential purposes; but Akiola, Fagbemi's son, has no right to occupy the shop now used as blacksmith's forge free of rent, unless the family council so wish. Though I am unable to make a declaration in the exact terms asked by the plaintiffs in the first part of their claim, I have endeavoured above to indicate what I consider to be the rights given by the customary native law to the plaintiffs, as members of the family, with respect to the family compound, which I declare to be the property of the family of Mabinuori deceased.

There still remains one other matter for me to determine in accordance with the directions of the Full Court, and that is the question of the costs in the Divisional Court. There is no question that this litigation has been prolonged by two causes; the first was the refusal of the plaintiffs to acquiesce in the advice of the chiefs as to the headship of the family; the other was the contention of the defendants that the plaintiffs had no interest whatever in the family compound, a contention which they have failed to uphold. Acting Chief Justice Speed awarded the defendants 50 guineas as costs of the issue tried before him, and as his decision was upset that award must be rescinded. Inasmuch, however, as both parties are somewhat to blame for the extent of the litigation which must have been a serious strain on their finances and inasmuch also as neither party has been completely successful in establishing their contention before this Court, I think that the fairest arrangement is to leave each party to bear their own costs.

I reserve to all parties general liberty to apply in case further disputes or questions of difficulty arise or further assistance is required from the Court, but I venture to hope that both sides will in future be able to combine in managing the affairs of the family in a friendly manner without further legal proceedings.

Counsel

Williams Ajasa	For the Appellants
Shyngle and Foresythe	For the Respondents